IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-914

GEORGE WALLACE, SR., et al.,

Petitioners,

v.

J. P. HOUSE, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioners, George Wallace, Sr., et al., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 7, 1975.

Opinions Below

The opinion of the Court of Appeals, which is not yet reported, is set out in the Appendix, pp. 34a-73a. The order of the Court of Appeals denying rehearing, which is not reported, is set out in the Appendix, p. 74a. The opinion of the district court is reported at 377 F.Supp. 1192, and is set out in the Appendix, pp. 1a-33a.

Jurisdiction

The judgment of the Court of Appeals was entered on July 7, 1975. The petition for rehearing was denied on September 29, 1975. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Did the court of appeals err in directing approval of the defendant city's "mixed" redistricting plan?

2. Did the court of appeals err in reversing the district court's award of counsel fees?

Statutory Provisions Involved

Section 5 of the Voting Rights Act, 42 U.S.C. §1973c, provides in pertinent part:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the first sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to a vote on account of race or color, or in contravention of the guarantees

> set forth in section 4(f)(2), and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither . . . the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.

Section 104 of Public Law 94-73, provides in pertinent part:

> In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of costs.

Statement of the Case

Plaintiffs commenced this action in the United States District Court for the Western District of Louisiana, alleging that the method of electing the board of aldermen of the city of Ferriday discriminated on the basis of race. Under the election procedures in effect prior to 1972, the five members of the board were elected on an at-large basis. Although 49.5% of the registered voters were black, no

black man or woman, with a fortuitous exception, had ever been elected to any municipal office in Ferriday or been nominated to such office by the Democratic Party. This was the result of the at-large system and of a racially polarized climate in which white voters cast their ballots in a bloc for white candidates. The plaintiffs contended, and the district court found, that the all white board of aldermen had long engaged in racial discrimination in every facet of public life, including public education, public employment, and public recreation facilities. On the basis of this and other evidence the district court concluded that Ferriday's at-large election scheme had unconstitutionally denied blacks a meaningful opportunity to participate in the political process. *White* v. *Regester*, 412 U.S. 755 (1973).

On July 9, 1973, the district court ordered the defendant city officials to prepare a single-member district plan for Ferriday. On August 27, 1973, the board submitted instead a "mixed plan" consisting of four single-member districts and one city-wide at-large district. On November 28, 1973, the court again ordered the defendants to submit a single-member plan, which they did under protest on December 18, 1973. On June 6, 1974, the district court held that the mixed plan preferred by the board, like the original at-large plan, had the effect of discriminating on the basis of race, and approved the single-member district plan. The district court also awarded plaintiffs a substantial counsel fee.

The court of appeals sustained the district court's decision that the at-large plan was unconstitutional. Pp. 36a-42a. It ruled, however, that the board's mixed plan was not unconstitutional, and that the district court was obligated to approve that plan since it was preferred by the board. Pp. 42a-67a. The court of appeals also held that the district court had no authority to make an award of counsel fees. Pp. 67a-70a.

Reasons for Granting the Writ

1. *Approval of the City Redistricting Plan*

The city of Ferriday is subject to the strictures of section 5 of the Voting Rights Act, which provides that no change in voting practices or procedures may be enforced unless first approved by the Attorney General or the United States District Court for the District of Columbia, 42 U.S.C. §1973c. The city's mixed redistricting plan, which the court of appeals purported to sanction, is just such a change in election laws. *Georgia* v. *United States*, 411 U.S. 526 (1973). No such preclearance under section 5, however, was ever sought or given. The district court and court of appeals thus erred in attempting to approve any city plan, and in considering the constitutionality thereof. The city should have been directed, instead, to seek preclearance under section 5.

The mixed plan at issue in this action was in no sense drawn by the district court. Compare *Connor* v. *Johnson*, 402 U.S. 690 (1971). On the contrary, both the boundaries of the four single-member districts and the inclusion of the at-large seat were entirely the work of defendant city officials. The provision for the at-large seat was made in contravention of the district court's instructions[1] and was expressly disapproved by that court.[2] The borders of the four single member districts were never even considered by the district court, since it insisted on a plan with five such districts. The court of appeals repeatedly stressed

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[1] See p. 4, *supra*.

[2] See pp. 15a-18a.

that the mixed plan was "the Board's",[3] and noted the defendants' insistence on the one at-large seat.[4] The Fifth Circuit expressly directed the district court to approve the mixed plan, or any other constitutional plan proposed by the defendants, even though the district court might prefer a different plan "more efficient or more just than a plan preferred by the legislature concerned".[5]

This case thus presents a situation indistinguishable from that in *Connor* v. *Waller*, 44 L.Ed. 2d 486 (1975). Here, as in *Connor*, the defendant officials presented a redistricting plan for court approval after an earlier plan was held unconstitutional. Here, as in *Connor*, the defendants attempted to substitute such approval for section 5 scrutiny, and to limit the court to applying a constitutional test less strict than the section 5 requirements. This Court has squarely held that the commands of the Voting Rights Act cannot be evaded in this manner

> Those Acts are not now and will not be effective as laws until and unless cleared pursuant to §5. The District Court accordingly also erred in deciding the constitutional challenges to the Acts based upon claims of racial discrimination.

Connor v. *Waller*, 44 L.Ed. 2d at 488. The rule in *Connor* applies *a fortiori* in this case, since the court of appeals, in approving the city's plan, stressed that the burden of proof was on plaintiffs to demonstrate its discriminatory purpose or effect,[6] whereas in a section 5 proceeding the

[3] Pp. 43a, 58a, 61a, 62a, 65a, 70a.

[4] Pp. 44a, 67a, 70a.

[5] P. 63a.

[6] "Nor have plaintiffs demonstrated that the at-large device here was conceived as a tool of racial discrimination . . . . The only evidence that plaintiffs have produced to demonstrate that the Board's plan will have an invidiously discriminatory effect is the suggestion that the very existence of the one at-large position will enable the white voters of Ferriday to control three aldermanic seats instead of two." Pp. 60a-61a. The defendants insisted in their briefs below that this burden was the plaintiffs'. They stated the issue presented by this aspect of the case to be "Whether the lower court erred in concluding that the evidence presented at the trial of this matter was sufficient to sustain the required burden of proof that defendants' first districting plan, defendants' exhibit No. 2, containing four single member districts and one at-large district, constituted institutionalized gerrymandering and consequently constitutionally infirm [sic] . . . Stated another way, has the plaintiff met the required burden of proof in demonstrating that members of the black community have less opportunity than do other residents in the district to participate in the political processes and elect legislators of their choice as a result of the at-large scheme voting in the Town of Ferriday." Brief of Appellant, No. 74-2654, pp. 1, 6.

burden of proof would be on the city. *Georgia* v. *United States*, 411 U.S. 526, 536 (1973); *City of Richmond* v. *United States*, 45 L.Ed. 2d 245, 258 (1975); 28 C.F.R. §51.19.

This case was briefed in the autumn of 1974 and argued on March 4, 1975. *Connor* v. *Waller* was not decided until June 5, 1975, and the Fifth Circuit may well have been unaware of that decision when it handed down its decision in the instant case on July 7, 1975. Petitioner promptly brought *Connor* to the attention of the court of appeals in a timely Petition for Rehearing,[7] but the court of appeals denied the petition without comment and with no indication that it had considered the impact of *Connor*. Under these circumstances plenary review by this Court would appear unnecessary; the decision approving the defendants' mixed plan should be reversed *per curiam*, or vacated and remanded for reconsideration in the light of *Connor*.[8]

[7] Petition for Rehearing and Suggestion That Rehearing Be En Banc, No. 74-2654, pp. 1-4.

[8] Even if the mixed plan were not subject to the rule in *Connor*, the courts below, prior to considering that plan, should have di-

2. *The Award of Counsel Fees*

On July 7, 1975, the court of appeals vacated the award of counsel fees on the ground that the district court had no statutory authority to make such an award in a voting rights case. The court relied exclusively on this Court's decision of *Alyeska Pipeline Service* v. *Wilderness Society*, 44 L.Ed. 2d 141 (1975). Pp. 67a-70a.

Less than a month later, on August 6, 1975, Congress adopted Public Law 94-73, extending and expanding the Voting Rights Act of 1965. Section 402 of the Law amended section 14 of the Voting Rights Act to add the following language:

> In any action or proceeding to enforce the voting guarantees of the Fourteenth or Fifteenth amendment, the court, in its discretion, may allow the prevailing party other than the United States, a reasonable attorney's fee as part of costs.

This statute provides precisely the authorization required by *Alyeska* and which the Fifth Circuit demanded. Section 402 was expressly intended to overcome the barrier to awards of counsel fees created by *Alyeska*.[9]

Section 402 contains a clear statutory basis for the district court's award of counsel fees. As the Fifth Circuit

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rected it be submitted for clearance under section 5 out of deference to the primary jurisdiction of the Attorney General. See Brief for Appellees, *Marshall* v. *East Carroll Parish*, No. 73-861, pp. 9-18. Petitioners maintain, as they did below, that the at-large seat in the mixed plan was constitutionally infirm; in view, however, of *Connor* v. *Waller*, it does not appear necessary to reach this issue.

[9] S. Rep. 94-295 stated in part:

> "Before May 12, 1975, when the Supreme Court handed down its decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 95 S.Ct. 1612 (1975), many lower Federal courts followed these Congressional policies and exercised their traditional equity powers to award attorney's fees under earlier civil rights laws as well."
>
> These pre-*Alyeska* decisions remedied a gap in the specific statutory provisions and restored an important historic remedy for civil rights violations. However, in *Alyeska*, the Supreme Court held that the federal courts did not have the power to grant fees to 'private attorneys general,' or private enforcers of civil rights laws, except under statutes whose language specifically authorizes such fee awards.
>
> . . . Section 403, like section 402, provides the specific statutory authorization required by the court in Alyeska."

Pp. 42-43. Congressman Drinan explained:

> "Mr. Chairman, I also wish to comment on section 402, a provision which I offered as an amendment during the mark-up. This section authorizes the court, in its discretion to award a reasonable attorney's fee to the prevailing party in a voting suit. This provision is extremely important if the dual enforcement scheme envisioned by section 401 is to be effective. We cannot expect private litigants, especially minorities, to bear the tremendous costs of instituting suit to remedy unlawful voting practices. In the wake of the recent decision of the Supreme Court in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, No. 73-1977 (May 12, 1975), the importance of section 402 is underscored. In that case, the Court held that counsel fees are not ordinarily recoverable, even by 'private attorneys general', in the absence of a statute authorizing them. No such statute presently exists for voting suits."

121 Cong. Rec. H4735 (Daily Ed., June 2, 1975).

[10] Congress, in adopting section 402, expressly noted its intent to adopt this standard enunciated in *Newman*. S. Rep. 94-295, p. 40; H. Rep. 94-196, p. 34; 121 Cong. Rec. H 4735 (Daily Ed. June 2, 1975).

noted, plaintiffs succeeded in overturning the Ferriday at-large election scheme as a "violation of the Fourteenth and Fifteenth Amendment rights of that [black] near-majority of the local electorate." P. 36a. In such a case the successful plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).[10] Although section 402 was not

in effect on the date of the Fifth Circuit decision, this case was still pending when that statute was adopted. Section 402 is the law now in effect and must be applied to this case. *Bradley* v. *Richmond School Board*, 416 U.S. 696, 710-724 (1974). The application of section 402 to authorize an award of counsel fees is especially just since, at the time this case was commenced and tried in the district court, and until the decision in *Alyeska*, awards of counsel fees were mandated by the Fifth Circuit under the "private attorney general" rule. P. 68a.[11]

In view of the adoption of section 402, the court of appeal's decision denying counsel fees in this case, as in *Bradley*, must be reversed. Since, however, section 402 was adopted after the decision below and after the time for a petition for rehearing had ended, and because the applicability of the statute is beyond dispute, plenary review by this Court would appear unnecessary. The denial of counsel fees should be overturned *per curiam*, or the decision should be vacated and remanded for reconsideration in light of the enactment of that statute.

[11] See, e.g., *Fairley* v. *Patterson*, 493 F.2d 598 (5th Cir. 1974); *Lee* v. *Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971).

CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit. The decision of the Fifth Circuit should be summarily reversed; in the alternative, the judgment of the Fifth Circuit should be vacated and the case remanded for reconsideration in the light of *Connor* v. *Waller* and the adoption of section 402 of Public Law 94-73.

Respectfully submitted,

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APPENDIX

Opinion of the District Court, June 6, 1974

UNITED STATES DISTRICT COURT

W. D. Louisiana

Monroe Division

Civ. A. No. 17971

June 6, 1974

George Wallace, Sr., et al.,

v.

J. P. House, Individually and as Registrar of Voters of Concordia Parish, Louisiana, et al.

• • • • •

Paul Henry Kidd, Kidd, Katz & Halpin, Monroe, La., Stanley A. Halpin, Jr., New Orleans, La., *for Plaintiffs.*

W. C. Falkenheimer, Dist. Atty., Seventh Judicial Dist., Vidalia, La., Robert C. Downing, Asst. Atty. Gen. of La., Monroe, La., A. Mills McCawley, Sp. Counsel to the Atty. Gen. of La., Shreveport, La., *for Defendant J. P. House.*

Norman M. Magee, Ferriday, La., *for all other Defendants.*

Dawkins, *Senior District Judge.*

Findings of Fact and Conclusions of Law

1. This class action is brought pursuant to 42 U.S.C. § 1983. Plaintiffs seek a declaratory judgment, pursuant

to 28 U.S.C. § 2201, a preliminary injunction, a permanent injunction, and other appropriate relief to enjoin the deprivation, under color of law, by the State of Louisiana (and in particular the Town of Ferriday) of the rights, privileges, and immunities of the plaintiffs and the class they represent, arising under the Constitution of the United States and, more particularly, the Fourteenth and Fifteenth Amendments. Jurisdiction is conferred in this Court by 28 U.S.C. § 1343(3) and (4).

2. Plaintiffs Henry A. Montgomery, Clarence L. Hymon, L. J. Scott, Leon Smith are black citizens of the United States and residents and registered voters in the Town of Ferriday, Concordia Parish, Louisiana. All were candidates for the Board of Aldermen for the Town of Ferriday March 25, 1972. All were unsuccessful. Louis Hill, Jr., another plaintiff, has died since this suit was filed.

3. Plaintiffs George Wallace, Sr., Jesse L. Bloodshaw, and Louis R. Jones are black citizens of the United States, and residents and registered voters in the Town of Ferriday. They were unsuccessful candidates for the Democratic Executive Committee for the Town at the Election held March 25, 1972.

4. The plaintiffs sue individually and as representatives of the class of black voters of the Town, and as potential candidates for the Board of Aldermen.

5. The Town of Ferriday is a municipal corporation and is recognized by the State of Louisiana pursuant to L.S.A.—R.S. 33:51 et seq. (Lawrason Act.)

6. Defendant J. P. House is a white citizen of Ferriday. He is the Registrar of Voters in Concordia Parish and was sued both in his capacity as Registrar and individually.

7. Defendant L. W. Davis is Mayor of Ferriday. He has responsibility for the control, care, and management of the Town as provided by L.S.A.—R.S. 33:321 et seq. He is sued in his individual and official capacities.

8. Defendants Raymond Galloway, Glenn E. Ratcliff, Raymond Cooper, George M. Scruggs, and Guy R. Serio are the present members of the Board of Aldermen for the Town. As such they constitute the legislative governing body of the Town, pursuant to L.S.A.—R.S. 33:321 et seq. They also have the duty and responsibility of determining the districting arrangement for the election of Aldermen. They are sued in their individual and official capacities.

9. Defendants John F. Anders, Purser Raborn, and A. E. Torres are the present members of the Democratic Executive Committee for the Town. They are sued individually and in their capacities as Democratic Executive Committeemen.

10. The five members of the Ferriday Board of Aldermen are currently elected on an at-large basis, with no residency requirements, by the electors living within the Town limits. The Town being a Lawrason Act city, as indicated, the Board of Aldermen performs purely legislative functions. All of the present Aldermen are white, and only one black ever has been elected to serve on the Board, and no black ever has been elected to any other office in the Town.

11. According to the 1970 census, the total population of the Town is 5,239. Of this total, 2,211 are white, and 3,028 are black. Thus, although a significant proportion of the population is black, there is no black member now serving on the Board of Aldermen, and only one black ever has served on the Board.

12. The at-large scheme of electing Aldermen in the Town effectively deprives plaintiffs and their class of the right to vote, on account of race, in that it invidiously cancels out the voting strength of blacks within the Town.

13. Practically all of the black population of the Town lives in two geographically discernable areas: (1) the area east of the railroad tracks, and (2) the area in the southwest portion of the town. These areas are known to be the black residential areas of the Town.

14. There has been a continuing history of State and local official racial discrimination in Ferriday and the Parish of Concordia, which, until fairly recent times, has extended to deprivation of the rights of blacks to register and vote and to participate in the democratic process.

15. Ferriday is a one-party town, with nominations by the Democratic Party being tantamount to election.

16. Black voters of Ferriday vote consistently for the Democratic Party nominee for Aldermen and other political offices. The Democratic nominees are consistently elected, yet they fail to respond properly to the needs of the black community.

17. Other voting practices and procedures of the State of Louisiana and the Town of Ferriday compound and

multiply the racially discriminatory effect of the at-large scheme of elections for Aldermen in the Town.

18. Specifically, by L.S.A.-R.S. 18:358, Louisiana law provides for a majority rather than a plurality requirement in primary elections. Under this provision, any candidate who receives a mere plurality must stand for election in a second primary. The white voter registration and voting in the at-large scheme thus effectively prohibits any black candidate from gaining election.

19. Also by L.S.A.-R.S. 18:351, Louisiana law provides for "anti-single shot" or "full slate" voting, which in at-large elections forces the voter to cast ballots for candidates who he does not support as well as for candidates he supports. The law prevents the racial voting minority in at-large elections from concentrating their support for a single minority candidate.

20. The at-large election scheme currently employed by the Town Board of Aldermen, particularly in combination with the above described practices, effectively excludes the black community from participation in the political process of electing Aldermen in a reliable and meaningful manner.

21. The above described black residential areas in the Town have well over a majority of the voting strength within those areas, but blacks in those areas are generally unable to elect a representative to the Board of Aldermen, and will continue to be unable to do so as a result of the at-large voting scheme.

22. Accordingly, the at-large scheme of election ensures that the white voters will continue to elect all members

to the Board of Aldermen, while plaintiffs and their class will continue to have neither the opportunity nor ability to be elected, all in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution and in deprivation of their rights thereunder.

23. The present at-large election scheme of the Town operates to minimize or cancel out the black voting strength in the Town, which deprives plaintiffs of their rights under the Fourteenth, and particularly the Fifteenth, Amendments, in that, when taken in combination with other voting laws of Louisiana, deprives plaintiffs and their class of the opportunity to elect blacks to the Ferriday Board of Aldermen, even though blacks comprise a significant proportion of the total population of the Town. This further deprives plaintiffs and their class, as potential black candidates, of the opportunity meaningfully to run for a position on the Board of Aldermen because of the design and effect of the at-large plan, thus relegating black electors to permanent minority status with no voice or influence upon defendants, all of which deprives plaintiffs of their rights under the Fourteenth and particularly the Fifteenth Amendments.

24. It is quite feasible to devise a single-member district plan for election of Aldermen in the Town of Ferriday, under which the rights of plaintiffs would not be violated.

25. The at-large election scheme described in the above paragraphs is maintained by the individual defendants under the color of law of the State of Louisiana, and of the Town of Ferriday, and under color of defendants' respective offices as officers and agents of the State.

26. On only one occasion, a black, Henry Montgomery, was elected to the Board of Aldermen, for a single four-year term. The evidence, however, indicates that his election on this occasion was due to a mere "stroke of luck" in that there were originally seven white candidates and Montgomery vying for five seats on the Board. Shortly before the election, one of the strongest white candidates withdrew because of a ruling that, as the Town's Fire Chief, he could not hold a second public office. His name remained on the ballot, however; and, because white voters divided their votes between this unqualified white candidate and the seventh white candidate, Montgomery, by obtaining a large percentage of the black vote within the Town, was able to place within the first five, and thus was elected.

27. That a single black candidate has been successful in an at-large race, by no means demonstrates that the particular at-large system does not operate to minimize or cancel out minority voting strength. Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir., en banc, 1973), and Beer et al. v. United States of America et al, and Johnny Jackson, Jr. et al., 374 F.Supp. 363, at 397-398 (U.S.D.C., D.C. 1974).

28. Witnesses for plaintiff credibly stressed the long history of racial segregation in education, housing, public facilities, and virtually all facets of everyday life in Ferriday. With special reference to suffrage, witnesses attested to past voting practices which worked to exclude blacks from the registration rolls and to stifle minority participation in the elections. Until very recently, strict proof of residency of specific duration, identification by

Social Security number, and other impediments had persisted as obstacles to would-be voters.

29. Further testimony at the trial indicated that the present selection process for Aldermen in Ferriday creates additional problems for its black citizens. To maximize exposure throughout the Town of Ferriday, and to gain other benefits from joining forces, white aspirants for Aldermen frequently form informal tickets to campaign essentially as a team. There have been no instances where any black candidate has been included upon any of these teams, and black citizens running for office are hampered by both their general, more individualistic political philosophies, and their more limited financial resources.

30. The record documents a history of bloc voting along racial lines, wherein the situation where a black candidate opposes a white candidate, virtually all of the white voters cast their vote for the white candidate, and virtually all of the black voters cast their vote for the black candidate.

31. To this variety of factors limiting black access to the political process, there are certain structural elements of a statutory origin which contribute to and build upon the informal factors, and which have the result under the totality of the circumstances of this case, of operating to dilute and abridge the voting power of the black voting strength in the Town of Ferriday. There are the majority vote requirement, La.Rev.Stat.Ann. Art. 18 § 358 (1966 Supp.), and the "anti-single shot" provision, La.Rev.Stat. Ann. Art. 18, § 351 (1966 Supp.), which are applicable in primary elections. As further amplified by plaintiffs' political science expert, Dr. Richard Engstrom, the majority-vote rule seriously limits a black candidate's chances

of winning, even if he were to receive all of the black vote. Without the possibility of a plurality victory by his candidate, the minority voter's influence on the election result sharply is reduced.

32. The "anti-single shot" law provides that if two or more offices are to be filled, as, for example, the five at-large seats for the Board of Aldermen, a voter must vote for candidates equal in numbers to the number of offices at stake, or his ballot will be invalidated with respect to all of those offices. As further amplified by plaintiffs' expert, Dr. Engstrom, although a voter wishes to support but one aspirant for an at-large seat, he must cast a vote against his candidate in order to have his vote for that candidate counted. The effect of this is that black voters are unable to run a single candidate and urge that black voters only vote for that candidate.

33. By virtue of the existence of a formerly law-required literacy test, and low voter registration, all of Louisiana, as well as Concordia Parish and the Town of Ferriday, has been made subject to the Voting Rights Act of 1965. Particularly, the Town was singled out for the presence of Justice Department attorneys to observe voting and election procedures as recently as 1972.

34. At-large elections, of course, are not *per se* racially discriminatory, see Whitcomb v. Chavis, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363, Burns v. Richardon, 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966), Fortson v. Dorsey, 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401 (1965). The Supreme Court has held that in such case, the plaintiffs' burden is to produce evidence that the political processes

used in nomination and election were not equally open to participation by the group in question—that is, that the group had less opportunity than did other residents meaningfully to participate in the political process and to elect public officials of their choice. We find here that the plaintiffs have met this burden of proof.

35. The Fifth Circuit Court of Appeals has pointed out that ". . . although population is the proper measure of equality in apportionment . . . access to the political process and not population [is] the barometer of dilution of minority voting strength." Zimmer v. McKeithen, *supra,* at 1303, and that the final determination is to be made ". . . on the totality of the circumstances," White v. Regester, 412 U.S. 755, at 769, 93 S.Ct. 2332, 37 L.Ed.2d 314, and Turner v. McKeithen, 400 F.2d 191, at p. 194 (5th Cir., 1973); and among the factors relevant to the question whether a minority group enjoys meaningful access, ". . . are the continuing effects of past discrimination on the minority group's ability to participate in the political process, the opportunity for the minority group to participate in the candidate selection process, the responsiveness of elected officials to the particular concerns of the minority group, and the strength of the stated interest in multi-member or at-large voting." Turner v. McKeithen, *supra,* at p. 194.

36. Thus, the measure of the validity of an at-large plan of election is the quality of opportunity, and the crucial inquiry is whether the plan leaves black citizens at liberty to participate in the electoral process on the same plane with white citizens. We find here that it does not.

37. Ferriday has a sizable black population and a sizable number of black voters, yet, with the single exception of

the Montgomery election, indicated above, no black ever has been elected to public office in the Town since Reconstruction. However, dilution of the vote of a racial minority is not shown by ". . . a mere disparity between the number of minority residents and the number of minority representatives," Zimmer v. McKeithen, *supra,* at 1305, or by the fact that ". . . the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential." White v. Regester, *supra,* at 765-766. Rather a claim of abridgment of minority vote is valid only when ". . . the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." White v. Regester, *supra,* at 766.

38. Careful examination of a variety of circumstances, giving due attention and weight to those factors, leads us here to conclude that the at-large election plan now in effect at Ferriday inevitably will have the effect of minimizing the voting strength of black citizens in Aldemanic elections.

39. The pertinent historical events demonstrate not only ". . . that . . . blacks [have] suffered a history of official racial discrimination which touched their right to participate in democratic processes," Zimmer v. McKeithen, *supra,* at 1305, 1306; White v. Regester, *supra,* at 766; Turner v. McKeithen, *supra,* at 194, 197; but also that the ". . . existence of past discrimination in general precludes the effective participation in the elect[ive] system." Zimmer v. McKeithen, *supra,* at 1305.

40. For generations, black citizens of Ferriday were segregated in public schools, public recreational facilities, and in other aspects of daily life, see, Smith v. Concordia Parish School Board (No. 11,577, U.S.D.C., W.D.La., commenced in 1965 and continuing to date). For a long period, they were victimized by governmentally sanctioned residential segregation; and even at present by discrimination in public employment, according to plaintiffs' credible witnesses.

41. Even more directly related to minority suffrage in Ferriday is Louisiana's traditional and ". . . successful policy of denying Negro citizens the right to vote because of their race." Louisiana v. United States, 380 U.S. 145, 85 S.Ct. 817, 13 L.E.2d 709 (1965). Further, the grandfather clause, Louisiana v. United States, *supra,* at 148, the literacy standard, La.Const. art. VIII, §1(c) (1961), the white primary, Louisiana v. United States, *supra,* at 148-149, and the "segregation committee," *Ibid.,* at 149, combined with each other and other devices to limit black political activity in Louisiana to a distressingly low level.

42. While the Voting Rights Act of 1965 has invalidated many of these discriminatory provisions, their debilitating effect remains.

43. Thus, it is clear that plaintiffs have met their burden of proof, and that at-large elections in Ferriday, under the totality of circumstances, in combination with the formal and informal conditions existing in the Town, operate to minimize and dilute the voting strength of black citizens there and to prevent them from participating equally with white citizens in the political process relative to selection of Aldermen.

44. Upon order, the Aldermen of Ferriday submitted to this Court two plans of districting for the Town of Ferriday. The plan first submitted (hereinafter the first plan) divided the town into four single-member districts and provided that the fifth Alderman would be elected from the Town at large. They then submitted to this Court another plan (hereinafter the second plan) which divided the Town of Ferriday into five single-member districts.

45. We find that the first plan submitted by the Aldermen constitutionally is unacceptable because of its at-large features, for all of the reasons indicated above in regard to the presently totally at-large plan. The Fifteenth Amendment to the United States Constitution provides in part that "[t]he right . . . to vote shall not be denied *or abridged* by . . . any State on account of race [or] color." (Emphasis added.) Thus, the Fifteenth Amendment prohibits abridgment of the right to vote as well as its outright denial, and in the context of this case, the election of one Alderman at-large clearly abridges the right to vote. The Supreme Court held in Reynolds v. Sims that: "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." 377 U.S. 533, at 555, 84 S.Ct. 1362, at 1378, 12 L.Ed.2d 506. See also the language in Allen v. State Board of Elections, 393 U.S. 544, at 569, 89 S.Ct. 817, 22 L.Ed.2d 1.

46. The first plan of defendants, containing the at-large provision, also is clearly constitutionally infirm because of the special racially discriminatory effect of that plan in the context of this case. The black population and voting strength in Ferriday is distributed in such a manner that

it appears that any fairly drawn single-member district plan of redistricting ordinarily will result in blacks having a majority in three of the five districts. Only clear racially discriminatory gerrymandering could accomplish a different result. Plaintiffs' expert, Engstrom, explained that political scientists recognize two types of gerrymandering. The first is called *"ad hoc"* gerrymandering, which refers to manipulation of district lines to achieve the desired political effect. To use this system in Ferriday, using five single-member districts to accomplish the end of three districts each containing a white voting majority, while theoretically possible, most immediately would be recognized (visually and otherwise) as a blatant gerrymandering. The second type of gerrymandering referred to by Engstrom is called "institutional" gerrymandering, which refers to devices other than manipulation of district lines in order to achieve a given political effect. A typical form of "institutional" gerrymandering is multi-member districts or at-large elections. John Wildgen in "Measuring Malapportionment in Louisiana," 16 Loyola L.Rev. 383, 394-395 (1969-70) explains this type of institutional gerrymandering as follows: "Where the black voting concentrations are too high to be subdivided into two or more districts which have an overall white majority, the alternate choice of those bent on maintaining white control is to 'take the opposite course and create large districts in which the black minority becomes diluted by the overwhelming number of white suburbanites. Instead of dividing the blacks, Louisiana has simply introduced more whites.'"

47. This course of action, suggested by defendants' "first plan," may not be tolerated. The inclusion of the at-large seat is merely a slightly more sophisticated device (that

is, institutional gerrymandering) for accomplishing what obviously would be impermissible if done by manipulation of district lines (that is, *"ad hoc"* gerrymandering). As Justice Frankfurter noted long ago, the Fifteenth Amendment ". . . nullifies sophisticated as well as simpleminded modes of discrimination." Lane v. Wilson, 307 U.S 268, 275, 59 S.Ct. 872, 876, 83 L. Ed. 1281 (1939).

48. The second plan submitted by the Aldermen, which is composed of five separate single-member districts with no at-large feature, does not suffer from these or any other constitutional defects. Plaintiffs have indicated at trial that they have no quarrel with this plan. In fact, it is quite similar to the five single-member districts plan proposed by plaintiffs.

49. Where, as here, a governing authority is found to be holding office by virtue of an election scheme which constitutionally is infirm, the Court under its equitable authority should take steps to correct such defects at the earliest feasible date.

50. As was stated in Reynolds v. State Election Board, 233 F.Supp. 323 (W.D.Okl., 1964) (three-judge Court), "No office holder has a vested right in an unconstitutional office any more than he has a right to be elected to that office." See also, Hamer v. Campbell, 358 F.2d 215 (5th Cir. 1966), cert. denied, 385 U.S. 851, 87 S.Ct. 76, 17 L.Ed. 2d 79 (1966); Bell v. Southwell, 376 F.2d 659 (5th Cir., 1967); Brown v. Post, 279 F.Supp. 60 (W.D.La., 1968); United States v. Democratic Executive Committee of Barbour County, Alabama, 288 F.Supp. 943 (M.D.Ala., 1968); United States v. Post, 297 F.Supp. 46 (W.D.La., 1969).

51. Even after officials have assumed office under unconstitutional redistricting schemes, federal courts have ordered new elections drastically shortening their terms of office. Swann v. Adams, 263 F.Supp. 225 (S.D.Fla., 1967) (three-judge court) (on remand); W. M. C. A., Inc. v. Lomenzo, Order of July 27, 1964 (unreported), aff'd 379 U.S. 694, 85 S.Ct. 713, 13 L.Ed.2d 698 (1965). In Herweg v. Thirty Ninth Legislative Assembly of Montana, 246 F.Supp. 454 (D.Mont.) (three-judge court), the Court declared that all State legislators had been elected invalidly from malapportioned districts, and that " . . . regardless of the term for which they purported to be elected, [none] may hold office or be recognized as a member of said Legislature after the 31st day of December, 1966."

52. In recent rulings the Fifth Circuit Court of Appeals has reversed orders of District Courts in Mississippi and ordered prompt new elections where supervisors had been elected under unconstitutional districting schemes. In Hall v. Issaquena County (unreported, Order of July 29, 1971, No. 71-3212) (Gewin, Coleman, and Goldberg, JJ.) and in Howard v. Adams County (unreported, Order of July 29, 1971, No. 71-2363, same panel), the Fifth Circuit ordered that new elections under a valid plan be conducted in each of these counties at an early date.

53. In cases where the very election process itself is found to be constitutionally infirm (such as malapportionment), calling out even more strongly for prompt remedial action than those in which there is found to be some racial discrimination which does not go to the heart of the election process itself, this Court and other District Courts have found that where a governing body has been elected

under either a malapportioned plan, or an election scheme such as at-large elections, cancelling out the voting strength of a cognizable portion of the populace, thus denying them access to the political process, prompt new elections are appropriate. See, Baker v. St. Helena Parish Police Jury (unreported, E.D.La., December 1, 1972, E. Gordon West, J., C.A. No. 71-293); Clark v. DeSoto Parish Police Jury (unreported, W.D.La., January 28, 1972, Ben C. Dawkins, Jr., J., C.A. No. 17,266); Fain v. Caddo Parish Police Jury, 312 F.Supp. 54 (W.D.La., 1970, Ben C. Dawkins, Jr., J.); London v. East Feliciana Parish Police Jury, 347 F.Supp. 132 (E.D.La., 1972, West, J.), reversed and remanded on other grounds, 476 F.2d 637 (5th Cir., 1973); Bailey v. Washington Parish Police Jury (unreported, E.D.La., June 19, 1972, Edward Boyle, J., C.A. No. 70-2861); Hargrove v. Caddo Parish School Board (unreported, W.D.La., June 7, 1972, Dawkins, J., C.A. No. 17,630); Johnson v. St. Martin Parish School Board (unreported, C.A. No. 16,965 W.D.La., June 5, 1972, Richard J. Putnam, J.); Chargois v. Vermilion Parish School Board, 348 F.Supp. 498 (W.D.La., 1972, Putnam, J.); Briscoe v. Jefferson Davis Parish Police Jury (unreported, C.A. No. 17,392 W.D.La., April 5, 1972, Edwin F. Hunter, Jr., J.). Moreover the Fifth Circuit in Keller v. Gilliam, 454 F.2d 55 (1972), reversed the District Court holding in Mississippi and held that where supervisors had been elected under an at-large plan, their terms should be shortened to no more than six months, and special elections conducted under a single-member district plan.

54. The Registrar of Voters here testified it would be possible for him to arrange the registration rolls so that an election could be held under defendants' five single-

member district plan at the same time that other Parish elections are to be conducted this summer (tentative first primary date August 17th).

55. Plaintiffs have moved for attorney's fees on the bad faith, common benefit, and private attorney general theories. Plaintiffs' counsel testified that up to and including the first day of trial, April 24, 1974, he expended 128.5 hours in the necessary preparation of plaintiffs' case, and itemized the time expended. Beyond this, on the second day of trial, plaintiffs' counsel expended a minimum of five hours in trial and preparation, and at least an additional five hours in preparation of plaintiffs' suggested Findings of Fact and Conclusions of Law, directed by this Court. This totals 138.5 hours in legal work expended by plaintiffs' counsel. Plaintiffs also have moved for certain trial expenses or costs, as follows: $100.00 as the charge by the Registrar of Voters for preparation of a precinct map and registration data; $250.00 for the expert witness fee of Professor Richard L. Engstrom (who was required to be present at trial for two days); and $65.28 for round-trip plane fare of the expert witness from New Orleans to Shreveport and return.

56. Earlier, the American rule was that attorney's fees are not favored in the absence of a specific statutory provision. See, for example, Simmons v. Friday, 190 F.2d 849, 851 (8th Cir., 1951). This former restrictive rule is inconsistent with the position taken by most common and civil law jurisdictions,[1] and effectively has been eroded

[1] In English law, the rule in equity varied from the rule at law. At equity, the Lord Chancellor had inherent power and unfettered discretion in awarding fees. Sprague v. Ticonic National Bank,

more recently in the United States. For a number of years, juridical writers and commentators have criticized the restrictive American rule, arguing that attorney's fees should be included as costs within the equitable discretion of the District Court.[2]

57. In recent years, federal courts also have criticized as well as seriously eroded the traditional American rule and have awarded attorney's fees in *pro bono publico* litigation in a variety of substantive areas under several theories in the absence of statutory authorization.

58. The federal courts also have given liberal interpretations to statutes which authorize the "discretionary" award of attorney's fees. For example, Title II of the Civil Rights Act of 1964, although only providing for fees in the "discretion" of the Court, has been interpreted to

307 U.S. 161, 166, 59 S.Ct. 777, 83 L.Ed. 1184 (1939). At law, however, awards of fees were statutory, dating at least from the Statute of Marlborough in 1267 (52 Hen. III, c. 6), and the Statute of Gloucester in 1275 (6 Edw. I, c. 1). See too, Pollock & Maitland History of English Law, 597 (2d ed., 1898) and Goodhart, Costs, 38 Yale L.J. 849 (1929). For a summary of general rules prevailing in other jurisdictions, see Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 Calif.L.Rev. 792 (1966).

[2] See, *e.g.*, Kuenzel, The Attorneys' Fee: Why Not a Cost of Litigation?, 49 Iowa L. Rev. 75 (1963); Stoebuck, Counsel Fees Included in Costs: A Logical Development, 38 U.Colo.L.Rev. 202 (1966); note, Attorney's Fees: Where Shall the Ultimate Burden lie?, 20 Vand.L.Rev. 1216 (1967); McLaughlin, The Recovery of Attorney's Fees; A New Method of Financing Legal Services, 40 Fordham L.Rev. 761 (1972); McCormick, Counsel Fees and Other Expenses of Litigation as an Element of Damages, 15 Minn.L.Rev. 619 (1931); note, The Allocation of Attorney's Fees after Mills v. Electric Auto-Lite Co., 38 U.Chi.L.Rev. 316 (1971); Allowance of Attorney's Fees in Civil Rights Actions, 7 Colum.J. of Law & Social Probs., 381 (1971).

call for an award of fees as a matter of course "unless special circumstances would render such an award unjust." Newman v. Piggie Park Enterprises, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968). An identical construction was given to the "discretionary" fee provision of Section 718 of the Emergency School Aid Act of 1972, 86 Stat. 235, by the United States Supreme Court in Northcross v. Board of Education, 412 U.S. 427, 93 S.Ct. 2201, 37 L.Ed.2d 48 (1973).

59. In the absence of statutes, American federal courts always have had equitable powers to award attorney's fees, Sprague v. Ticonic National Bank, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184 (1939), but until recent years have used the power rarely. Attorney's fees historically have been regarded as an appropriate punishment for those who litigate in bad faith, by using dilatory tactics or raising specious defenses. Aside from these situations, however, the most frequent awards of attorney's fees prior to the 1960's was in those cases where there was a recovery for the benefit of a class. In these cases, fees were assessed from a real or fictitious "fund" created by the attorney's successful prosecution.[3]

60. From 1939, when the Supreme Court in *Sprague, supra,* affirmed federal courts' equity power to award attorney's fees, until 1967, when the Supreme Court decided Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 87 S.Ct. 1404, 18 L.Ed.2d 475 (1967), the federal

[3] Although the "common fund" theory understandably arose most often in commercial cases, it was also found appropriate in consumer actions. See, *e.g.*, Washington Gas Light Co. v. Baker, 90 U.S.App.D.C. 98, 193 F.2d 29 (1951) and Bebchick v. Public Utilities Comm'n, 115 U.S.App.D.C. 216, 318 F.2d 187 (1963).

courts increasingly awarded attorney's fees in commercial suits. During the same period an increasing number of federal statutes were enacted, either authorizing a discretionary award of fees, or making such an award mandatory.[4] The Supreme Court's *Fleischmann* decision temporarily halted the erosion of the traditional rule, as lower courts read the decision to mean that fees should not be awarded in the absence of specific statutory authorization.

61. In 1970, however, the Supreme Court once again considered the issue of attorney's fees in Mills v. Electric Auto-Life Co., 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970). In *Mills,* the Court ordered fees paid to plaintiffs who had established that the corporation they were suing had issued misleading proxy statements, in violation of the

[4] See, *e. g.*, Fair Labor Standards Act, § 16 (b), 29 U.S.C. § 216 (b), June 25, 1938, 52 Stat. 1069; Copyright Act, 17 U.S.C. § 116, July 30, 1947, 61 Stat. 652; Labor-Management Reporting and Disclosure Act, § 501(b), September 14, 1959, 73 Stat. 535; Patent Infringement Suits, 35 U.S.C. § 285, July 19, 1952, 66 Stat. 813; Servicemen's Readjustment Act, 38 U.S.C. § 1822(b), September 2, 1958, 72 Stat. 1214; Packers and Stockyards Act, § 309(f), 7 U.S.C. § 210(f), August 15, 1921, 42 Stat. 165; Perishable Agricultural Commodities Act, § 7(b), 7 U.S.C. § 499g(b), June 10, 1930, 46 Stat. 534; Clayton Act, § 4, 15 U.S.C. § 15, October 15, 1914, 38 Stat. 731; Securities Act of 1933, § 11(e), 15 U.S.C. § 77k(e), May 27, 1933, 48 Stat. 82; Trust Indenture Act, § 323(a), 15 U.S.C. § 77www(a), August 3, 1939, 53 Stat. 1176; Securities Exchange Act of 1934, §§ 9(e), 18(a), 15 U.S.C. §§ 78i(e), 78r(a), June 6, 1934, 48 Stat. 889; Civil Rights Act of 1964, Title II, 42 U.S.C. § 2000a-3(b), Civil Rights Act, 1964, § 204; Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-5(k), Civil Rights Act, 1964, § 706; Fair Housing Act of 1968, § 812, 42 U.S.C. § 3612(e), April 11, 1968, 82 Stat. 88; Railway Labor Act, § 3, 45 U.S.C. § 153(b), May 20, 1926, 44 Stat. 578; Communications Act of 1934, § 206, 47 U.S.C. § 206, June 19, 1934, 48 Stat. 1072; and Interstate Commerce Act § 16, 49 U.S.C. § 16(2), February 4, 1887, 24 Stat. 384.

Securities Exchange Act. The Court based its decision on a theory of "corporate therapeutics" because the litigation benefited the corporation being sued (by securing compliance with the law, even though the benefit might never be financial),—the corporation, and not the plaintiffs bringing suit, should bear the expense of obtaining the benefit.

62. During the same period, equitable rules for awarding attorney's fees in *pro bono publico* litigation were also liberalized, often taking a cue from commercial law. In early school desegregation cases, attorney's fees were awarded successful plaintiffs only in the presence of the mose egregious forms of bad faith, and the benefeit theory almost never was applied.[5]

63. The largest impetus in awards of attorney's fees in *pro bono publico* litigation came after the enactment of the Civil Rights Act in 1964, and the decisions in *Newman, supra,* and *Mills, supra,* when the lower courts began to apply a form of the benefit theory in *pro bono* cases: by suing to enjoin racial discrimination, plaintiffs of small means were enforcing a strong national policy benefiting the entire nation. They were, in effect, acting as "private attorneys general" who rarely recovered damages in their suits. Courts realized that ". . . [i]f successful plaintiffs were routinely forced to bear their own attorney's fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts." *Newman, supra,* at 402.

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[5] However, see Rolax v. Atlantic Coast Line R. R., 186 F.2d 473 (4th Cir., 1951), for an early example of the application of the benefit theory.

64. Understandably, the "private attorney general" rationale increasingly has been applied to statutes which did not provide for attorney's fees, but which do embody strong national policy to vindicate personal rights—most specifically, the Civil Rights Acts passed in the wake of the Civil War: 52 U.S.C. §§ 1981, 1982, and 1983. Courts have recognized that ". . . in fashioning an effective remedy for the rights declared by Congress one hundred years ago, courts should look not only to the policy of the enacting Congress but also to the policy embodied in closely related legislation," Lee v. Southern Home Sites, 444 F.2d 143 (5th Cir., 1971), and have held that fees should be awarded not only in cases arising under recent statutes in which Congress has spoken, but also under older, related statutes in which Congress left the creation of remedies to the courts. The three-judge court in Alabama, in awarding attorney's fees under § 1983, summarized the rule: "If, pursuant to this action, plaintiffs have benefited their class and have effectuated a strong congressional policy, they are entitled to attorneys' fees regardless of defendants' good or bad faith. . . . Indeed, under such circumstances, the award loses much of its discretionary character and becomes part of the effective remedy a court should fashion to encourage public-minded suits . . . and to carry out congressional policy." Sims v. Amos, 340 F.Supp. 691 (M.D. Ala., 1972), aff'd sub nom. Amos. v Sims, 409 U.S. 942, 93 S.Ct. 290, 34 L.Ed. 2d 215 (1972).

65. The flux of the law thus has been one of shifting the emphasis from purpose (bad faith) to effect (vindication of national policies), or from punishment to therapeutics. The appellate courts also have been increasingly willing to review a trial court's determination regarding attor-

ney's fees. They have ruled that district judges abuse their discretion in denying attorney's fees in *pro bono publico* cases,[6] have ruled that district judges have erred by awarding too small an attorney's fee[7] and have even awarded attorney's fees themselves for prosecuting an appeal.[8]

66. Judge Robert F. Peckham, in La Raza Unida v. Volpe, 57 F.R.D. 94, 96 (N.D.Cal., 1972), concisely stated that the present status of the law is that an award of attorney's fees is appropriate in three types of situations: 1) the "obdurate behavior" situation, where the courts use their equitable powers to impose costs on defendants who have acted in bad faith; 2) the "common benefit" situation, where courts use their equitable power to ensure that the beneficiaries of litigation are the ones who share the expense; and 3) the "private attorney general" situation, where the courts use their power when necessary and appropriate to assure the effectuation of strong legislative policies.

67. In redistricting cases, particularly where there have been issues of racial discrimination, federal courts have awarded attorney's fees almost as a matter of course, because such actions clearly benefit the public as a whole,

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[6] *E. g.*, Bell v. School Board of Powhatan County, 321 F.2d 494 (4th Cir., 1963) (en banc); Nesbit v. Statesville City Board of Education, 418 F.2d 1040 (4th Cir. 1969) (en banc); Knight v. Auciello, 453 F.2d 852 (1st Cir., 1972).

[7] *E. g.*, Griffin v. County School Board of Prince Edward County, Virginia, 363 F.2d 206 (4th Cir., 1966) (en banc), cert. denied, 385 U.S. 960, 87 S.Ct. 395, 17 L.Ed.2d 305 (1966).

[8] *E. g.*, Clark v. Board of Education of the Little Rock School District, 449 F.2d 493 (8th Cir., 1971) (en banc).

"regardless of defendants' good or bad faith." Sims v. Amos, *supra.*

68. In *Sims, supra,* the Alabama reapportionment case, the Court was most explicit, stating that while defendants' adherence to "obviously unacceptable plans" amounted to bad faith:

> "Nevertheless, a finding of bad faith is not always a prerequisite to the taxing of attorneys' fees against defendants, and in this case, despite the availability of that ground, the Court has decided to base its award on far broader considerations of equity.
>
> "In instituting the case sub judice, plaintiffs have served in the capacity of 'private attorneys general' seeking to enforce the rights of the class they represent. . . . If, pursuant to this action, plaintiffs have benefited their class and have effectuated a strong Congressional policy, they are entitled to attorneys' fees regardless of defendants' good or bad faith. . . . Indeed, under such circumstances, the award loses much of its discretionary character and becomes part of the effective remedy a court should fashion to encourage public-minded suits. . . . and to carry out congressional policy.
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> ". . . The benefit accruing to plaintiffs' class from the prosecution of this suit cannot be over-emphasized. No other right is more basic to the integrity of our democratic society than is the right plaintiffs assert here to free and equal suffrage. In addition, congressional policy strongly favors the vindication of federal rights violated under color of state law, 42

U.S.C. § 1983, and, more specifically, the protection of the right to a nondiscriminatory franchise."

69. Using this approach federal courts in Mississippi consistently have awarded fees to plaintiffs in cases involving voting rights. Carpenter v. Toller (No. GC 718-K.N., Miss., Keady, J., May 26, 1971); Kitching v. Bobo (No. D.C. 7082-K, N.D.Miss., May 24, 1971, Keady, J.); Williams v. Hughes (No. D.C. 7076-S, N.D. Miss., Smith, J., February 19, 1971); Sigales v. Cumbest (No. 3239, S.D. Miss., Russell, J., February 18, 1970); Scott v. Burkes (No. 4782, S.D.Miss., Nixon, J., April 29, 1971); Dyer v. Love, 307 F.Supp. 974, 986 (N.D.Miss., 1969); and Martinolich v. Dean, 256 F.Supp. 612 (S.D. Miss., 1966).

70. Similarly in Louisiana in cases involving redistricting, the voting rights of blacks and Section 5 of the Voting Rights Act, federal courts have awarded plaintiff's fees on the "therapeutic" or "private attorney general" theories. Briscoe, et al. v. Jefferson Davis Parish Police Jury (C.A. No. 17,392 U.S.D.C., W.D.La., September 2, 1972, Hunter, J.); Claiborne Parish Civil League, et al. v. The Claiborne Parish School Board, et al. (C.A. No. 18,094, U.S.D.C. W.D.La., August 28 and September 18, 1972, Dawkins, J.); Clark v. DeSoto Parish School Board (C.A. No. 17,266, U.S.D.C., W.D.La., June 14, 1972, Dawkins, J.); Hargrove v. Caddo Parish School Board (C.A. No. 17,630, U.S.D.C., W.D.La., Dawkins, J.); Brach v. Franklin Parish School Board (C.A. No. 17,469, Dawkins, J.); London v. East Feliciana Parish Police Jury, 347 F.Supp. 132 (E.D.La., 1972, West, J.), reversed and remanded on other grounds 476 F.2d 637 (5th Cir., 1973).

71. In two recent cases, the United States Court of Appeals for the Fifth Circuit has upheld district court awards of attorney's fees under the common benefit and "private attorney general" theories. In Thompson v. Richland Parish Police Jury, 478 F.2d 1401 (5th Cir., 1973), rehearing denied 481 F.2d 1404 (1973), the Fifth Circuit affirmed summarily, pursuant to Rule 21, an award of attorney's fees by this Court's order of August 31, 1972, in a similar redistricting case. Even more recently, on May 13, 1974, the Fifth Circuit in Cornist et al. v. Richland Parish School Board et al., 495 F.2d 189 (5th Cir.) upheld an award of attorney's fees by this Court in a case of a single wrongfully dismissed teacher. The Fifth Circuit in that case upheld all of the grounds cited by the District Court for its award of attorney's fees, including an explicit affirmance that attorney's fees were appropriate because plaintiff's attorney ". . . had acted as 'private attorney general' in securing the rights of plaintiffs, which benefited not only them, but all the black teachers in the Parish, as well as the school system as a whole, by virtue of the system's being brought into compliance with federal law and Congressional policy." In support of this proposition, the Fifth Circuit cited McLaurin v. Columbia Municipal Separate School District, 478 F.2d 348 (5th Cir., 1973); Horton v. Lawrence County Board of Education, 449 F.2d 793 (5th Cir., 1971), and Lee v. Southern Home Sites, *supra*. Thus, with these cases, the Fifth Circuit explicitly has sanctioned and found precedent for awards of attorney's fees under the "private attorney general" theory and the common benefit theory.

72. Here it is clear that plaintiffs have acted as "private attorneys general" in securing the most important

right to an unabridged vote upon which our whole system of government is based, and which is supported by the strongest Congressional and constitutional policy.

73. Clearly, also, the benefits here are therapeutic to the body politic of Ferriday as a whole, and, by correcting the constitutionally infirm method of selecting Aldermen, plaintiffs have secured a benefit which goes to every citizen of the Town of Ferriday.

74. While the Board of Aldermen's steadfast adherence to a constitutionally unacceptable plan during the course of this litigation would amount to bad faith, and despite the availability of that ground, we have decided to base our award on the far broader considerations of equity contained in the common benefit and "private attorney general" notions.

75. Similarly, where courts have found an award of attorney's fees appropriate, they also have found an award of litigation expenses such as expert witness fees, transportation for expert witnesses, and other special services. For example, in Sims v. Amos, *supra*, the Court awarded plaintiffs' expert witness, Dr. Valinsky, an expert witness fee and expenses taxed as Clerk's Costs in the amount of $3,235.55.

76. Under the common benefit theory and private attorney general theory, courts have applied the reasoning of *Sprague, supra*, and its progeny, directly to expert witness fees and other extraordinary costs of litigation. In Banks v. Chicago Mill and Lumber Co., 106 F.Supp. 234 (E.D.Ark., 1950), the district court referred to Rule 54(d)

of the Federal Rules of Civil Procedure, and 28 U.S.C. § 1920, stating:

> "These provisions vest the question of costs in a civil case in the sound judicial discretion of the Court, and in an equity case, such as this, the Court is not limited to the so-called 'statutory costs', but in a proper case may make additional allowances of costs in accordance with [the] sound equitable principles. [*Sprague, supra.*"

The Court concluded: "I have the power to allow as costs the compensation paid to expert witnesses for their preparation and testimony . . ." (*Id.*, at pp. 236-237.)

77. Similarly, in Andresen v. Clear Ridge Aviation, 9 F.R.D. 50 (D.Neb., 1949), the Court considered the taxability of several items of expense, including expert witness fees. It held (at p. 52):

> "While no statute identifies those expenditures as taxable costs, that circumstance is not alone decisive upon the issue of their allowability. This action for injunctive relief is equitable in its nature. The power of the court in awarding costs in it is, therefore, not circumscribed as narrowly as is the judicial authority respecting costs in an action for the recovery of a judgment for money only."

See also, Swan Carburetor Co. v. Chrysler Corp., 55 F. Supp. 794 (E.D.Mich., 1944), modified in other respects, 149 F.2d 476 (6th Cir., 1945).

78. In La Raza Unida v. Volpe, *supra*, one of the leading cases upholding the "private attorney general" theory, the Court held (at p. 102):

> "The affidavits of the expert witnesses were quite helpful to the Court, and were a crucial part of plaintiffs' presentation. For the reasons stated above in granting attorneys' fees, plaintiffs' motion to award expert witness fees is also granted."

See also, Swann v. Charlotte-Mecklenburg Board of Education, 431 F.2d 138, 148 (4th Cir., 1970), modified in other respects, 401 U.S. 805 (1971) (awarding expert fees in a school desegregation case); Jackson v. School Board of City of Lynchburg, (No. 534, W.D.Va., April 28, 1970) (expert consultant fees in a desegregation case); Jones v. Wittenberg, 330 F.Supp. 707, 722 (N.D.Ohio, 1971) (expert witness fees in prison case); and Wright v. McMann, 321 F. Supp. 127, 144 (N.D.N.Y., 1970) (fees granted in decree of August 19, 1970) (expert witness fees in prisoner's rights case).

79. In a most recent case decided by Judge Rubin (E.D. La.) under Title VII of the Civil Rights Act, Barth et al. v. Bayou Candy Co., Inc., (C.A. No. 72-753, Opinion and Order of May 1, 1974), the Court allowed as costs items such as photocopying, postage, and long distance phone calls. The Court also allowed a photographer's fee at $250.00 per day.

80. Accordingly, we find that an award should be made of an expert witness fee for Professor Richard L. Engstrom in the amount of $250.00 and an additional $65.28 for his air fare, for a total of $315.28, to be paid by defendant

Board of Aldermen for the Town of Ferriday into the registry of the Court, and the Clerk shall thereafter issue a check in like amount to Professor Engstrom. Similarly, the Registrar of Voters, J. P. House's fee for developing the precinct and registration data also shall be allowed as a legitimate plaintiffs' expense, and defendant Board of Aldermen shall pay the amount of $100.00 into the registry of the Court, and the Clerk shall thereafter issue to Mr. House a check in the amount of $100.00.

81. We further conclude that attorney's fees should be allowed to plaintiffs' attorney under the circumstances of this case for the reasons indicated.

82. As to the amount of the fees, the recent decision of the Fifth Circuit in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir., 1974), makes clear those factors to be considered in determining the amount of fees to be allowed. Once it has been determined that fees are to be allowed, the standard for determining the amount of fees is the same whether the authorization of the award is contained in a statute or is within the sound equitable discretion of the Court.

83. Counsel for plaintiffs submitted an itemized list of the time spent in preparation and trial of the case, which as indicated earlier, totaled 138.5 hours. Plaintiffs' counsel also made himself available for any cross-examination by opposing counsel. Defendants did not question that the number of hours expended was reasonable.

84. Some of the considerations suggested in *Johnson, supra,* here applicable, include the results obtained at trial,

and the insurance of adequate remuneration to those attorneys representing the prevailing party. As Judge Rubin stated in *Barth, supra,* in order to accomplish Congressional policy ". . . able representation of plaintiffs should be encouraged. And one way in which such representation may be encouraged is to ensure that successful litigation results in adequate remuneration to those attorneys representing the plaintiffs, the prevailing party."

85. The customary fee for attorneys in Louisiana begins at $35.00 per hour. We agree with Judge Rubin when he said in *Barth, supra,* that ". . . as an attorney gains experience, or as his or her experience increases in a particular area of law, counsel's fees increase substantially." This is understandable in that an attorney's expertise in a given area allows him to be more efficient and to perform work in less time than would less experienced counsel. Considering the length of this litigation, the complexity of the factual issues, and the proof required of plaintiffs, the necessity for expert testimony, and all other factors, 138.5 hours appears to the Court as an extremely efficient use of time. Moreover, from our own observation of Mr. Halpin's performance throughout this litigation and at trial, it is clear that a less experienced attorney would have not only spent more of his own time, but would have required more time of the Court in conducting the trial, various pretrial matters, and the like. Mr. Halpin's experience in redistricting and voting rights cases is well known to the Court by virtue of his appearance representing plaintiffs in over twenty voting and redistricting cases before this Court. He also has been counsel in other such cases before other federal district courts in the State, as well as in the United States Court of Appeals for the Fifth Circuit, and before the United States Supreme Court.

86. Accordingly, we find that an award to plaintiffs' counsel in the amount of $50.00 per hour for the 138.5 hours expended by him is appropriate, and any less would be unfair, or a total of $6,925.00.

Opinion of the Court of Appeals, July 7, 1975

GEORGE WALLACE, SR., et al.,

Plaintiffs-Appellees,

v.

J. P. HOUSE, Individually and as Registrar of Voters of Concordia Parish, Louisiana, et al., Defendants, L. W. Davis, etc., et al., Defendants-Appellants.

No. 74-2654.

United States Court of Appeals,

Fifth Circuit.

July 7, 1975.

• • • • •

Affirmed in part; reversed in part; vacated in part and remanded.

Grooms, District Judge, concurred and filed opinion.

Roney, Circuit Judge, specially concurred and filed opinion.

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Appeal from the United States District Court for the Western District of Louisiana.

Before GOLDBERG and RONEY, Circuit Judges, and GROOMS, District Judge.

GOLDBERG, Circuit Judge:

This case and a companion case, Perry v. City of Opelousas, 5 Cir. 1975, —— F.2d ——, also decided today, form another chapter in the long and difficult struggle to ensure

equal voting rights for all citizens. In the proceedings below the district court determined that an all-at-large aldermanic election scheme in a small Louisiana town operated to dilute the votes of the town's black citizens in an unconstitutional fashion. The court also reasoned that the proposal of the Board of Aldermen [the Board] to adopt an election plan with a single at-large member also failed the constitutional test, and so ordered the implementation of an all-single-member selection process. Finally, the district court awarded attorney's fees to the black plaintiffs. 377 F.Supp. 1192. Although the all-at-large election scheme is clearly unconstitutional in the circumstances of this case, and the award of attorney's fees was proper, we believe that the Board's mixed election plan is not unconstitutional, and that the district court should therefore have deferred to the municipality's legislative judgment and adopted that plan. We affirm in part and reverse in part.

I

Ferriday, Louisiana, is a town of 5,200 people in Concordia Parish, in the northeastern part of the state. As is common in other towns in the area, Ferriday's population is closely divided between blacks and whites: the 1970 census counted about 3,000 blacks (58%) and 2,200 whites (42%). In March, 1972, the voters of Ferriday went to the polls to elect various local officials, including five aldermen, all of whom were to be elected at-large, with no residence requirements. It is fair to say that the town is both highly politicized and racially polarized, so that when the voters were faced with a choice of five white candidates and five black candidates, they apparently opted right down the line for racial solidarity, with whites voting for whites and

blacks voting for blacks. Since whites enjoyed a very slight edge in voter registration over blacks (1,571 (50.5%) to 1,538 (49.5%)),[1] and since 83% of the eligible voters turned out on election day, no one should have been surprised to learn that all five white candidates had been elected and all five black candidates defeated.

Even if they were not surprised, the defeated blacks were very unhappy with absolutely no black representation on a Board of Aldermen in a town with a black population majority. The black candidates accordingly filed this 42 U.S.C. § 1983 class action in federal district court on June 13, 1972, charging that Ferriday's all-at-large voting scheme impermissibly diluted the votes of local blacks, and asking for appropriate declaratory and injunctive relief. The court ordered each party to submit alternative redistricting plans, and a bench trial was held on April 24 and 25, 1974, after which the district court concluded that only single-member aldermanic districts would sufficiently guarantee to the black voters the full efficacy of their right of suffrage.

II

There is no question that Ferriday's all-at-large aldermanic election scheme operated to dilute the votes of the black citizens of the town, in violation of the Fourteenth and Fifteenth Amendment rights of that near-majority of the local electorate. As this Court noted in Howard v.

[1] This discrepancy between population and voting strength is apparently explained by plaintiffs' admission that there are relatively more whites of voting age in Ferriday than there are blacks. As of April 24, 1974, whites continued to maintain a slight majority in voting strength in the town; the total number of registered voters has not changed very much since the completion of the great black voter registration campaigns in 1966.

Adams County Bd. of Supervisors, 5 Cir. 1972, 453 F.2d 455, 457, aggrieved voters may establish the existence of an unconstitutional districting scheme either by showing a racially motivated gerrymander or a plan drawn along racial lines, or by demonstrating that, designedly or otherwise, the particular scheme operates "to minimize or cancel out" the voting strength of minority elements of the voting population. The second type of cognizable grievance set out in *Howard*—the grievance of plaintiffs here—is generally denominated "dilution." We sketched the parameters of this complex doctrine in Zimmer v. McKeithen, 5 Cir. (en banc) 1973, 485 F.2d 1297:

> The Supreme Court has identified a panoply of factors, any number of which may contribute to the existence of dilution. Clearly, it is not enough to prove a mere disparity between the number of minority residents and the number of minority repersentatives. Where it is apparent that a minority is afforded the opportunity to participate in the slating of candidates to represent its area, that the representatives slated and elected provide representation responsive to minority's needs, and that the use of a multi-member districting scheme is rooted in a strong state policy divorced from the maintenance of racial discrimination, Whitcomb v. Chavis [1971, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363], would require a holding of no dilution. [*Chavis*] would not be controlling, however, where the state policy favoring multi-member or at-large districting schemes is rooted in racial discrimination. . . . [W]here a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized

interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that existence of past discrimination in general precludes the effective participation [of the complaining group] in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts. The fact of dilution is established upon proof of the existence of an aggregate of these factors. The Supreme Court's . . . pronouncement in White v. Regester [1973, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314], demonstrates, however, that all these factors need not be proved in order to obtain relief.

485 F.2d at 1305. *See also* Turner v. McKeithen, 5 Cir. 1973, 490 F.2d 191, 194.

In this case, plaintiffs presented evidence that, with one recent and fortuitous exception,[2] no black has ever been elected to municipal office in Ferriday. They showed that, in this thoroughly Democratic town (there are only 85 registered Republicans in the entire parish), no black man or woman has ever been selected to run as the candidate of the Democratic Party. Plaintiffs then chronicled the all-too-familiar story of racial segregation and other racial

[2] One of the plaintiffs, Henry Montgomery, won an aldermanic seat in the March, 1968, Democratic primary and served as alderman from 1968 until 1972, when he was defeated in his bid for reelection. Montgomery's 1968 victory was apparently made possible because a popular white opponent withdrew from the race too late to have his name removed from the ballot, and so drained off sufficient white votes to enable Montgomery to win. The district court properly deemed Montgomery's victory a "stroke of luck" which is not likely to be repeated under present conditions.

discrimination in every facet of local public life, including public education and public employment, which discrimination is abating only now. With respect to the distribution and quality of municipal services, the district court found that the streets and sidewalks, sewers and public recreational facilities provided by the Town for its black citizens are clearly inferior to those which it provides for its white citizens. In all these years, the Ferriday Board of Aldermen has failed miserably in its responsibilities to its many black constituents.

A large part of the explanation for this inexcusable neglect of black interests is found in the fact that most blacks were not able to vote in Ferriday until fairly recently. Although no federal registrars have ever been sent to Ferriday, there were very few blacks registered to vote until the Voting Rights Act of 1965 was enacted and enforced, and the legacy of intimidation and inferior educational opportunity inhibits many blacks in the exercise of the suffrage even when they are able to vote. Moreover, two features of Louisiana municipal election law coincide with the brief experience of black voting to minimize the impact of black votes upon the outcome of local elections, and therefore, presumably, upon the conduct of local officials. First, Louisiana law provides for a majority rather than a plurality requirement in primary elections. La. Rev.Stat. § 18:358. This seemingly nondiscriminatory provision[3] requires any candidate who receives a mere plurality in the primary to run in a second primary. Where the voters vote overwhelmingly along racial lines, where a majority of the

[3] The majority vote requirement can hardly be said to have been intentionally passed for the purpose of diluting the newly-created black vote, for it has been the law of Louisiana since at least 1898. *See* Louisiana Acts of 1898, No. 136.

registered voters are white and where all of the officials are elected at-large, no black candidate is likely to achieve a majority in either the first or the second primary. And here, the primary is *the* election. As if the majority vote requirement were not enough of an impediment to black candidates, Louisiana law poses another severe obstacle to all minority voting interests, racial and otherwise, in the form of the "anti-single shot" or "full slate" requirement. La.Rev.Stat. § 18:351.[4] This provision forces a voter in an at-large election to vote for as many candidates as there are places to be filled, on pain of having his ballot invalidated as to all of the at-large positions for that particular office. Where a minority interest group does not boast a full slate of candidates, the anti-single shot law requires supporters of the minority group to cast ballots for at least some of the group's opponents, thereby rendering the minority's task that much more difficult.[5] *See generally,* Derfner, Racial Discrimination and the Right to Vote, 26 Vand. L.Rev. 523 (1973).

The district court was thus presented with a history of a dearth of black representation in Ferriday municipal government, with clear indications that white aldermen have not been in the habit of rendering effective representation for blacks, and with evidence that the past practice

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[4] The anti-single shot requirement has existed since at least 1922. *See* Louisiana Acts of 1922, No. 97.

[5] In the March, 1972, primary, Ferriday blacks fielded candidates for all five aldermanic positions, so that if we assume that the voting was done solely on the basis of race, we must also assume that blacks could have voted for blacks for all five seats and thus avoided the perils of the anti-single shot provision in that particular election.

of disenfranchisement of blacks has combined with present provisions of Louisiana's at-large election machinery to make it almost impossible for blacks in Ferriday to compel any alderman to consider their interests. The court decided that at-large government as practiced in Ferriday was not constitutionally representative government insofar as the Town's black citizens were concerned, and that the plaintiffs had made out a prima facie dilution case under the *Zimmer* guidelines. Although the Board attempted to rebut plaintiff's case at trial by arguing that Ferriday is a friendly small town where everyone knows everyone else and votes for the best man, the Board admitted to this Court at oral argument that plaintiff's dilution case had not been rebutted with respect to the all-at-large aldermanic districting scheme, and that the traditional scheme is unconstitutional. The able trial judge properly found that the all-at-large plan is irremediably defective, and that he correctly ordered the Board to submit a constitutional plan for his approval. The problem on appeal is whether the district court made the proper choice between the Board's alternative plans.

III

A

The Board submitted two redistricting plans to the district court.[6] The first [or mixed] plan divided Ferriday into four reasonably compact single-member districts and one at-large district encompassing the entire community; the second created five compact single-member aldermanic districts. The maximum population percentage variations are 6.7% for the first plan and 4.3% for the second, and the

[6] Plaintiffs submitted a plan for five single-member districts which did not differ significantly from the Board's all-single-member plan, and plaintiffs do not object to the district court's choice of the latter plan.

The Board's two plans are as follows:

FIRST PLAN

Council District	Total Population	Deviation from Mean Average of 1,310	Proportion of District Population White	Black
A	1,249	—4.6%	99%	1%
B	1,318	+0.1%	7%	93%
C	1,341	+2.1%	0%	100%
D	1,331	+1.7%	64%	36%
At-large	5,239	—	42%	58%

SECOND PLAN

Council District	Total Population	Deviation from Mean Average of 1,048	Proportion of District Population White	Black
A	1,072	+3.0%	99%	1%
B	1,045	—0.4%	98%	2%
C	1,035	—1.3%	2%	98%
D	1,049	0.0%	0%	100%
E	1,045	—0.4%	2%	98%

average percentage variations are ±2.11% and ±1.02%, respectively. Both plans clearly fall within the permissible zone of district population variances allowed in state and local government units by the rule of Mahan v. Howell, 1973, 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320, and plaintiffs do not claim that the single-member districts contained in either plan have been manipulated in an illegal fashion. The discrete problem presented by this case is whether the one at-large district in the Board's first plan ineluctably taints the plan with the unconstitutional aura of dilution.

The practical politics of the controversy are simple. The first plan will create two "safe" white seats and two "safe" black seats, while the critical fifth aldermanic slot will be filled by the votes of all the registered voters of Ferriday. Since the whites have an over-all voting majority, however slim, and since almost every voter in the community seems to vote for persons of his or her own color, the at-large alderman will almost certainly be white and the Board will thus continue to be controlled by the Town's white residents. On the other hand both parties agree that any fairly-drawn division of the community into five single-member districts will yield two "safe" white seats and three "safe" black seats, so that control of the Board will pass to the black residents of Ferriday if the second plan is adopted.[7]

[7] We note that the mayor of a Louisiana municipality presides at meetings of the board of aldermen and casts the deciding vote in case of an equal division among the aldermen. La. Rev.Stat. 33:404. Since the mayor is elected at-large, La.Rev.Stat. 33:381, his limited voting power must be considered to some extent in deciding whether a particular aldermanic election scheme unconstitutionally abridges the voting rights of minority voters. In this case, it is probable that the mayor of Ferriday will primarily represent the interests of the white voting majority, but plaintiffs do not argue and we cannot conclude that this additional factor is a significant one in the circumstances of this case.

Plaintiffs argue that the first plan—the plan the Board prefers—is an illegal "institutional" gerrymander, for the use of the one at-large district enables the whites to retain the political control that they would surely lose under an all-single-member plan Defendants rejoin that the all-single-member plan would merely yield the opposite racial and political result, and that the adoption of the second plan would constitute reverse discrimination. Although there was no direct evidence that the Board drew up the first plan with the specific intention of disenfranchising its black constituents, the district court could not help but conclude that the aldermen knew what the different results of the two plans would be. The court then decided that the Board's strong preference for the first plan with its one at-large district was "merely a slightly more sophisticated device . . . for accomplishing what obviously would be impermissible if done by manipulation of district lines," 377 F.Supp. at 1200—that is, the dilution of the black vote—so that the one at-large district operated to minimize and cancel out the local black vote for the same reasons as the traditional all-at-large system. The district court therefore rejected the Board's mixed plan and adopted its all-single-member plan. Unfortunately, the learned trial judge was forced to apply some very broad generalizations of voting rights law to a particularized problem of first impression, and we believe that he misapprehended some of the legal problems upon which his conclusions were based.

B

The Supreme Court first set a normative standard for the "one man, one vote" doctrine in Reynolds v. Sims, 1964, 377 U.S. 533, 81 S.Ct. 1362, 12 L.Ed.2d 506, when it held

that "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." 377 U.S. at 568, 84 S.Ct. at 1385, 12 L.Ed.2d at 531. In *Reynolds*, the Court was faced with the then-common situation wherein, as a result of legislative malapportionment, one district (usually an urban one) might contain two, five or ten times as many people as another district (usually a rural one), and yet have only the same number of representatives in the legislature. For the purposes of state government, it was as if each rural voter had two, five or ten times as many votes as each urban voter, and such "overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there." 377 U.S. at 563, 84 S.Ct. at 1382, 12 L.Ed.2d at 528. The resulting discrimination against the underrepresented voters was obvious, for such malapportionment allowed most legislators to ignore the problems and interests of a substantial portion, or even of a majority, of the state's population and yet run no risk of defeat at the polls.[8]

Since *Reynolds*, the Supreme Court and the other federal courts have faced various problems connected with the "one man, one vote" principle,[9] but nowhere have the courts faced such difficulty in application of the rule as when

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[8] The rule of *Reynolds* was subsequently applied to local governments in Avery v. Midland County, 1968, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45, with certain exceptions not relevant here. *See* Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 1973, 410 U.S. 719, 93 S.Ct. 1224, 35 L.Ed.2d 659.

[9] For an analysis of the Supreme Court's "one man, one vote" cases, *see* Casper, Apportionment and the Right to Vote: Standards of Judicial Scrutiny, 1973 Sup.Ct.Rev. 1.

asked to determine the constitutionality of electoral systems utilizing multi-member or at-large districts. Multi-member districts are particularly troublesome because they may satisfy the "one man, one vote" standard where raw population data are concerned and yet effectively negate the voting strength of large numbers of voters. Of course, since there are winners and losers in every election, it might be said that losers' votes are always "lost," and there is clearly nothing unconstitutional about such a result in itself. But multi-member districts have a peculiar capacity to deny representation to racial or political minority groups which could or would obtain such representation if the polity in which they live were divided instead into single-member constituencies. Among the defects generally assigned to multi-member districts are: first, their tendency—by virtue of their winner-take-all aspect—to submerge minorities and to over-represent the majority party or group as compared with that party or group's polity-wide electoral position; second, a general preference for legislatures which reflect community interests as closely as possible; third, the fact that since at-large members necessarily represent their multi-member district as a whole, identifiable constituencies within the district have no one member specifically charged with representing them; and fourth, the fact that ballots in at-large elections may be bulky and confusing to voters. *See, e. g.,* Chapman v. Meier, 1975, —— U.S. ——, 95 S.Ct. 751, 760, 42 L.Ed.2d 766, 778; Whitcomb v. Chavis, *supra,* 403 U.S. at 158-59, 91 S.Ct. at 1877, 29 L.Ed.2d at 384-85; Carpeneti, Legislative Apportionment: Multi-Member Districts and Fair Representation, 120 U.Pa.L.Rev. 666 (1972); Banzhaf, Multi-Member Electoral Districts—Do They Violate the "One Man, One Vote" Principle, 75 Yale L.J. 1309 (1966); Note, Ghetto Voting and At-Large Elections: A Subtle Infringement Upon Minority Rights, 58 Geo. L.J. 989 (1970). The question is at what point these undesirable effects coalesce so as to deny legislative representation to minorities on a scale of constitutional dimensions.

For the first few years after *Reynolds,* the Supreme Court declined to analyze the problems presented by multi-member districts, aside from noting in Fortson v. Dorsey, 1965, 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401, Burns v. Richardson, 1966, 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376, and Kilgarlin v. Hill, 1967, 386 U.S. 120, 87 S.Ct. 820, 17 L.Ed.2d 771, that such schemes were not unconstitutional *per se,* while cautioning that particular uses of the device might not withstand inspection.[10] In Connor v. Johnson, 1971, 402 U.S. 690, 91 S.Ct. 1760, 29 L.Ed.2d 268, however, the Court decided that multi-member districts are sufficiently less desirable than single-member districts so that when federal courts are forced to fashion apportionment plans, they ought as a general rule to prefer single-member districts to multi-member solutions.

Then, in Whitcomb v. Chavis, 1971, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363, the Court was asked to decide the constitutionality of a multi-member plan for the election of state legislators in Marion County, Indiana. The plan provided that all the voters of the County would vote for all eight of the County's state senators and all fifteen of its assemblymen, and since a majority of the County's

[10] The Court implicitly approved the use of multi-member districts in *Reynolds* itself, 377 U.S. at 577, 84 S.Ct. at 1389, 12 L.Ed. 2d at 536, but on the same day, in Lucas v. Colorado General Assembly, 377 U.S. 713, 84 S.Ct. 1459, 12 L.Ed.2d 632, the Court catalogued various defects inherent in such devices.

voters were in the habit of voting for white, Republican candidates, the result was that black and Democratic legislators were relatively rare in the Marion County delegation. A group of black plaintiffs attacked the scheme, on the theory that it produced fewer black legislators than there were black residents in the County. The district court held that the multi-member districts illegally minimized and cancelled out black voting strength. On appeal, the Supreme Court found the multi-member plan to be constitutional and reversed the judgment of the district court.

The Court began its discussion by stressing that multi-member districts may in some cases dilute minority voting rights in an impermissible manner, particularly if the districts are large or if the election scheme lacks residence requirements (so that all of a district's representatives might live in one area of the district), thus enhancing the prospects of majoritarian monopoly of representation. That said, the Court noted that challengers of election schemes have the burden of demonstrating the unconstitutionality thereof, and concluded that the *Chavis* plaintiffs had failed to discharge their burden of proof of dilution. The plaintiffs and the district court had assumed that black citizens could be adequately represented only by black officials and had reasoned that a comparison of population figures and legislative strength made it clear that the multi-member plan produced fewer black legislators than the black population deserved, that one black person's vote was in this way less effective than one white person's vote, and that this inequality of voting power was the very sort of abridgement of the right of suffrage forbidden by *Reynolds* and its progeny. The Supreme Court held, however, that the disproportion between black residents and

black legislators did not prove invidious discrimination absent evidence and findings that blacks in Marion County

> had less opportunity than did other [citizens] to participate in the political processes and to elect legislators of their choice. We have discovered nothing in the record . . . indicating that [blacks] were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen. Nor did the evidence . . . show . . that [blacks] were regularly excluded from the slates of both major parties, thus denying them the chance of occupying legislative seats.

403 U.S. at 149-50, 91 S.Ct. at 1872, 29 L.Ed.2d at 379-80.

On the contrary, blacks were regularly slated as candidates and were elected with some frequency. Most importantly, the evidence showed that candidates and elected representatives, white as well as black, "avowed a substantial commitment to the substantive interests of black people," 403 U.S. at 150 n. 30, 91 S.Ct. at 1873, 29 L.Ed.2d at 380, and there was no evidence that the legislators charged with representing blacks in the formulation of state policy and programs had ignored the interests of their black constituents. Faced with this record, the Court determined that the major source of plaintiffs' difficulties lay in the fact that most Marion County blacks were Democrats in a Republican area, and that plaintiffs' problems were not so much in gaining access to the political process as in losing elections.

> The voting power of [blacks] may have been 'cancelled out' as the District Court held, but this seems a mere euphemism for political defeat at the polls . . . The

> mere fact that one interest group or another . . . has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies where . . . there is no indication that this segment is being denied access to the political system.

403 U.S. at 153-56, 91 S.Ct. at 1874, 29 L.Ed.2d at 381-82.

Although *Chavis* did not provide an opportunity for the Supreme Court to demonstrate precisely wherein multi-member plans may suffer from constitutional infirmities, a better occasion soon presented itself in White v. Regester, 1973, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314. In that case, the Court encountered a massive challenge to a redistricting plan for the Texas state legislature. One of the questions presented was whether multi-member districts in the Dallas and San Antonio areas operated to dilute the votes of blacks and Mexican-Americans in those localities. The evidence presented in *Regester* was of a very different sort than that offered in *Chavis*. In *Regester*, the district court found that Texas blacks and browns had experienced a long and recent history of pervasive discrimination with respect to voter registration and voting. The court found further that Dallas blacks were never slated as candidates by the political organizations in that city, that white candidates had often injected racial issues into campaigns, that blacks in Dallas were "generally not permitted to enter into the political process in a reliable and meaningful manner," 412 U.S. at 767, 93 S.Ct. at 2340, 37 L.Ed.2d at 325, and that Mexican-Americans in San Antonio suffered similar political disabilities. The multi-member district device was intimately related to the perpetuation of this effective disenfranchisement of minority voters, for the plan allowed the white majorities in Dallas and San Antonio totally

to negate black and brown voting strength, and the device also allowed the state legislators who were elected by the white majority totally to ignore the interests of their minority constituents. Faced with an election scheme which did not then and might not ever provide any voice—white, black or brown—in the legislature for Dallas blacks and San Antonio Mexican-Americans, the district court concluded that in this case the multi-member districts could not be tolerated, for they operated to exclude substantial racial minorities not only from political victory but even from political consideration, and that such a result was inimical to those constitutional notions of fair political representation that are bound up in the concept of "the right to vote."

The Supreme Court affirmed the judgment of the district court, and so held for the first time that a multi-member plan devised by a legislature was unconstitutional. The Court rejected the notion proposed by plaintiffs that "every racial or political group has a constitutional right to be represented in the state legislature," 412 U.S. at 769, 93 S.Ct. at 2341, 37 L.Ed.2d at 326, but agreed with the district court that the totality of circumstances in *Regester* supported a finding of an illegal dilution of the voting rights of minority citizens. The Court repeated its stricture, first enunciated in *Chavis*, that in order to sustain claims that the votes of a minority group have been minimized or cancelled out:

> it is not enough that the . . . group . . . has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members

> had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

412 U.S. at 765-66, 93 S.Ct. at 2339, 37 L.Ed.2d at 324.

The right to vote considered in *Chavis* and *Regester* implies that the voter have some reasonably meaningful participation in the choice of candidates and of policies. When the Court condemned political systems where substantial minority groups are effectively excluded from the nomination and election process, it meant that to give a black voter a choice of voting for one of three white candidates who know nothing and care less about his or her interests is to render the vote nugatory and the right meaningless. Of course, such a situation could and does occur in single-member districts where the aggrieved minority may be so small as to command no consideration by elected public officials, although in such a case it might be argued that where a minority is sufficiently small, there can be no substantial dilution of its politically insignificant vote. The particular vice of multi-member districts, however, is their tendency to minimize minority representation even at the lowest political levels in a way that could not occur if single-member districts existed in their stead. Multi-member districts thus pose a problem of degree of fair representation—"fair" not in the sense either of "considerable" or of "proportionate," but rather in a general sense of equity. *Chavis* and *Regester* represent efforts to decide whether a particular political system is fair in this general equitable sense; the two cases make the dilution doctrine an intensely practical, factually-oriented rule against fundamental unfairness. It is for this reason that the Court

placed so great a reliance on the records to support or refute plaintiffs' contentions that their respective interest groups were precluded from exercising that amount of political power to which they ought in all fairness to have had access. There was nothing in the record in *Chavis* to indicate that this fundamental political unfairness existed in Marion County, Indiana. Conversely, in *Regester*, the Court made no sweeping statements about the nature of the right to vote and what specific measures must be taken to preserve it intact, but rather concluded that:

> on the record before us, we are not inclined to overturn [the finding of the district court that the multi-member system in San Antonio effectively negated the votes of local Mexican-Americans], representing as [it does] a blend of history and an intensely local appraisal of the design and impact of the [San Antonio] multimember district in the light of past and present reality, political and otherwise.

412 U.S. at 769-70, 93 S.Ct. at 2341, 37 L.Ed.2d at 326.

C

The federal district courts and courts of appeal have had many opportunities to apply the dilution doctrine to various fact situations and to distill from the Supreme Court's cases additional guidelines for decision. *Chavis* and *Regester* hold explicitly that no racial or political group has a constitutional right to be represented in the legislature in proportion to its numbers,[11] so it follows that no

[11] An interesting application of this rule is found in Van Cleave v. Town of Gibsland, W.D.La. 1974, 380 F. Supp. 135, where a white citizen of a small Louisiana town sought to invalidate a local

such group is constitutionally entitled to an apportionment structure designed to maximize its political advantages. Gilbert v. Sterrett, 5 Cir. 1975, 509 F.2d 1389; Turner v. McKeithen, *supra;* Cousins v. City Council of City of Chicago, 7 Cir. 1974, 503 F.2d 912. Neither does any voter or group of voters have a constitutional right to be included within an electoral district that is especially favorable to the interests of one's own group, or to be excluded from a district that is dominated by some other group. Taylor v. McKeithen, 5 Cir. 1974, 499 F.2d 893; Gunderson v. Adams, S.D.Fla.1970, 328 F.Supp. 584, aff'd, 1971, 403 U.S. 913, 91 S.Ct. 2225, 29 L.Ed.2d 692; *see* Ferrell v. State of Oklahoma ex rel. Hall, W.D.Okla.1972, 339 F.Supp. 73, aff'd, 406 U.S. 939, 92 S.Ct. 2045, 32 L.Ed.2d 328. The critical question under *Chavis* and *Regester* is not whether the challenged political system has a demonstrably adverse effect on the political fortunes of a particular group, but whether the effect is invidiously discriminatory, that is, fundamentally unfair.

This Court has decided several dilution cases in recent years, and although we have consistently adhered to the proposition that "access to the political process and not population (is) the barometer of dilution of minority voting

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election in which all of the Town's aldermanic seats were won by black candidates in an all-at-large election. The plaintiff in *Van Cleave* claimed that the at-large voting scheme deprived him of the opportunity to elect a white candidate as alderman because the Town had a slight black voting majority and the ballots were apparently cast along racial lines. The white plaintiff admitted, however, that he had not been denied access to the process of slating candidates and conceded that it was too early to conclude that the black aldermen-elect would not be responsive to the needs of their white constituents. In these circumstances, the district court found that no unconstitutional dilution of the local white vote had occurred, and so rendered judgment for defendants.

strength," Bradas v Rapides Parish Police Jury, 5 Cir. 1975, 508 F.2d 1109, 1112, we believe that our decision in this case will be better understood after a discussion of two recent cases involving multi-member electoral districts: Zimmer v. McKeithen, 5 Cir. (en banc) 1973, 485 F.2d 1297, and Turner v. McKeithen, 5 Cir. 1973, 490 F.2d 191.[12] *Zimmer* presented us with the question of whether dilution of black voting rights could occur where blacks constituted a majority of the population of a given polity but a minority of the registered voters,[13] and where the redistricting plan provided that all the members of the school board and police jury in a rural Louisiana parish would be elected at-large. The district court and a panel of this Court decided that there could not be any dilution of the black vote in such a case. After an exhaustive review of the factual situation underlying the multi-member plan, the en banc Court found that dilution of the black vote could and did exist and would be perpetuated by the all-at-large plan. The existence of a black population majority was not dispositive of the dilution issue, for it is not population but access to the political process that determines whether an interest group enjoys the full vigor of its political rights. Nor could the small size of the parish ensure against dilution, for the size of a multi-member district bears only on the possibility for voter confusion and lack of voter identification with the elected representatives, neither of which

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[12] Other recent dilution cases in this Circuit include Gilbert v. Sterrett, *supra*; Bradas v. Rapides Parish Police Jury, *supra*; Reese v. Dallas County, 5 Cir. (en banc) 1974, 505 F.2d 879, revs'd, 1975, —— U.S. ——, 95 S.Ct. 1706, 43 L.Ed.2d ——, Robinson v. Commissioners Court, 5 Cir. 1974, 505 F.2d 674; Howard v. Adams County Bd. of Supervisors, 5 Cir. 1972, 453 F.2d 455, cert. denied, 407 U.S. 925, 92 S.Ct. 2461, 32 L.Ed.2d 812.

[13] For a discussion of *Zimmer*, *see* 87 Harv.L.Rev. 1851 (1974).

is necessary to a finding of dilution. The record in *Zimmer* revealed a long history of racial discrimination in all aspects of local life, a lack of access by blacks to the nomination process, a majority vote requirement, an anti-single shot voting requirement and a history of bloc voting by race, all of which compelled the conclusion that the combination of the white voter majority and the all-at-large system would result in all-white school boards and all-white police juries which would pay little attention to black interests. Also of considerable importance to our result was the fact that there had been a strong Louisiana policy *against* at-large elections for school boards and police juries until 1968, when the pertinent state statute was changed to allow at-large elections for those governmental bodies. Although we did not find it necessary to decide whether this abrupt change in policy—which coincided with increased black voter registration—was racially motivated, we did decide that the new state policy in favor of all-at-large elections was not entitled to great deference where the record showed that the effect of the policy in this parish was to dilute black voting rights. We concluded that the facts in *Zimmer* were indistinguishable from those of *Regester* and that although some multi-member election plans might be constitutional, this one was not.

In Turner v. McKeithen, *supra*, we dealt with another multi member election scheme for a Louisiana parish police jury. The record in *Turner* contained the usual history and lingering effects of racial discrimination and revealed that although blacks constituted a substantial portion of the parish population, no black had ever been elected to the police jury. The evidence also showed that blacks were neither considered nor consulted in the candidate slating process, but that the black vote was instead solicited "at a

stage when the actual candidate selection has already occurred and the possibility for meaningful influence is significantly diminished." 490 F.2d at 195. Finally, the local policy supporting multi-member districts was the same new and dubious one examined in *Zimmer*. We agreed with the district court that the plan foreclosed effective black participation in the political life of the parish, and we affirmed the trial court's invalidation of the all-at-large scheme.

Zimmer and *Turner* are good examples of the proper application of the principles of the dilution doctrine. The Court in both cases paid close attention to the facts of the particular situations at hand, to the history of studied neglect by elected representatives of the interests of a large number of their own constituents, to the practical effects of electoral schemes which were likely to perpetuate that shameful failure of representation and to the apparent absence of any rational state or local policy in support of the all-at-large plans. We found in both cases that the only way in which blacks would be able to secure a fair hearing of their needs was to order elections to be held on the basis of those single-member districts which the defendant governing bodies themselves had only recently abandoned.

IV

With respect to the case at bar, we have already discussed the reasons why Ferriday's traditional all-at-large aldermanic election system dilutes the voting rights of local blacks in a substantial and therefore unconstitutional fashion. The situation here is in many respects very like those of *Zimmer* and *Turner*. The long history and continuing effects of racial discrimination, the failure of the local political organizations to consult blacks regarding the slating of candidates, the unresponsiveness of the elected

aldermen to the needs of the black community and the Louisiana anti-single shot and majority vote requirements have combined to give the white voting majority an absolute dominion over local politics by means of the all-at-large system.[14] When the district court found this to be so, the experienced trial judge drew the further conclusion that even a single at-large aldermanic slot would have the same pernicious effect that the all-at-large system had, and the court thus held that only an all-single-member plan would ensure fair political representation for Ferriday's black citizens.

We believe that the trial court was mistaken in adopting its *per se* rule in an area so factually-oriented and practically-based as this one, and we find that a thorough study of the Board's mixed single-member-at-large-member plan requires the conclusion that the scheme is not unconstitutional. If the mixed plan were to be adopted, the political life of Ferriday would differ in several crucial respects from its present configuration. Of primary importance is the fact that the plan assures local blacks of at least two aldermen who will necessarily be accountable to the overwhelming black population of their single-member districts. The Board's mixed plan is a great improvement over its predecessor for other reasons as well. Where there is only one at-large member to be selected in a given policy, neither the anti-single shot law nor the majority vote requirement can invidiously discriminate against minority voters. If there is only one at-large place to be filled and there are minority candidates, then minority voters can vote for minority candidates. If there are no minority candidates, the minority voter can refrain from voting for a majority

[14] *See* the quotation from *Zimmer* at pp. 38a-39a, *supra*.

candidate without voiding his other votes. In a one-party community such as Ferriday, the requirement that a candidate receive a majority of the votes cast in the first primary if he is to avoid a second primary has historically enabled the white majority in Ferriday to defeat in the second primary all black candidates fortunate enough to survive the first primary. If there is only one at-large seat, however, the majority vote requirement is no longer objectionable. Even if the voting in Ferriday continues to be along racial lines and a white candidate defeats a black candidate for the position, it would be difficult to complain about such a result since a majority of the voters are white. Of course, the same thing could be said about the majority vote requirement in an all-at-large setting; however, the effects of this electoral device, standing alone, are not particularly discriminatory in any case and are minimized where there is only one at-large position effected by the rule. The majority vote requirement will no longer be fundamentally unfair to black voters if the Board's mixed plan is implemented. Furthermore, in a community where there is a precarious balance between white and black voting strength and where black voters are in the habit of voting in their own interest, it is improbable that white candidates for the one at-large position will be so confident of the size and racial solidarity of the white vote that such candidates could afford to ignore or offend the nearly 50 percent of the electorate which happens to be black.

Plaintiffs would urge that none of these practical considerations can refute the district court's conclusion that the one at-large position renders the Board's mixed plan unconstitutional, for no one denies that defendants' insistence on the one at-large seat will almost certainly prevent blacks from gaining control of the Board of Alder-

men. Plaintiffs contend that the effect of the plan is ample proof of its discriminatory purpose. These arguments might be entitled to great consideration if the governmental interest advanced in support of the at-large device were of the new and questionable sort found in *Zimmer* and *Turner*, for those cases show that a tenuous state policy underlying the preference for at-large districting is a good indication that the scheme is intended to dilute the vote of minority interests. But the situation here is very different from those of *Zimmer* and *Turner* in that respect.

At-large voting in aldermanic elections has been the state policy of Louisiana since 1898; the policy is presently codified as La.Rev.Stat. 33:381. The reason usually given in support of at-large elections for municipal offices is that at-large representatives will be free from possible ward parochialism and will keep the interests of the entire city in mind as they discharge their duties. While this theory does not always hold true in practice, as the experience of Ferriday's black citizens attests, we cannot say that the rationale is so tenuous that it can be disregarded. Nor have plaintiffs demonstrated that the at-large device here was conceived as a tool of racial discrimination as appeared to be the case in *Zimmer* and *Turner*. When the enabling legislation was passed in 1898, and for the almost 70 years thereafter when the policy was in force across the state, there could have been no thought that the device was racially discriminatory, because very few blacks were allowed to vote in Louisiana during that period. As Judge Wisdom noted in Taylor v. McKeithen, *supra*:

> Historically, there has never been any nexus whatever in Louisiana between the [use of particular electoral devices] and the denial of access of blacks to [public office]. In this century, until this Court com-

> pelled parish registrars of voters to register blacks and until the Voting Rights Act of 1965 was enacted and enforced, blacks could not be elected to [public office]—to be blunt—*because there were no black voters.* It is as simple as that. Since adoption of the Louisiana Constitution of 1898 and until recently, the legislature disfranchised blacks overtly; it was never necessary for the legislature to resort to covert disenfranchisement of blacks by manipulating [apparently neutral electoral devices].

499 F.2d at 896.

We would be callous indeed to tell plaintiffs that seventy years of illegality somehow legitimizes continued dilution of black voting rights, but that is not the thrust of our discussion. In order for there to be substantial--and thus illegal impairment—of minority voting rights, there must be some fundamental unfairness in the electoral system, some denial of fair representation to a particular class. The seventy years of consistent state support of at-large elections for municipal offices strongly suggests that the broad political judgment upon which the policy is based is not racially-motivated, and the lack of racial motivation is at least some evidence of a lack of discriminatory effect. The only evidence that plaintiffs have produced to demonstrate that the Board's plan will have an invidiously discriminatory effect is the suggestion that the very existence of the one at-large position will enable the white voters of Ferriday to control three aldermanic seats instead of two.[15] Plaintiffs' argument is thus that black votes will be

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[15] *See* n. 7, at p. 24a, *supra*, for a discussion of the limited legislative role of the mayor in Ferriday.

diluted unless their effect is maximized, but we have already seen that the Constitution does not require such a result.

Under the mixed plan, the black citizens of Ferriday will certainly command the allegiance of forty percent of the Town's aldermen, a share only slightly lower than the proportion of black voters in the entire electorate; such representation will give blacks that access to the political process which was denied to them under the all-at-large plans here, in *Zimmer* and in *Turner*. This new-found black political power is unlikely to permit the new Board to neglect black interest as former boards have done.[16] We also believe that the state policy favoring at-large aldermen is not unreasonable, and that this characteristic coupled with the long existence of the policy require that we assign the policy considerable weight in the calculus of dilution. We have also shown that the objectionable aspects of the Louisiana anti-single shot and majority vote requirements will be obviated or minimized under the mixed plan. Our examination of the record and of the probable practical effects of the Board's mixed election plan convinces us that the new scheme will not substantially dilute the voting rights of Ferriday's black citizens and that the plan is not unconstitutional under the rule of *Chavis*, *Regester* and *Zimmer*.

V

Since we have determined that both of the Board's alternative reapportionment plans—the mixed plan and the

[16] We do not imply that plaintiffs in dilution cases can never attack new, untried electoral schemes which are likely to produce unresponsive representatives. The potential that each such plan has for ending historic unconstitutionality of representation or for creating new illegality can be determined only by an examination of the facts of each case.

all-single-member plan—were constitutional, we must now consider whether a federal district court which is presented with two constitutional redistricting plans should choose the one preferred by the governmental unit involved or whether the court should be free to choose the "better" of the two plans. In other words, we must decide if the district court's choice of the all-single-member plan is reviewable only under the abuse of discretion standard, as plaintiffs contend.

At the very beginning of judicial scrutiny of legislative apportionment plans, the *Reynolds* Court cautioned that "legislative apportionment is primarily a matter for legislative consideration and determination, and judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." 377 U.S. at 586, 84 S.Ct. at 1394, 12 L.Ed.2d at 541. Since the basis of federal jurisdiction over legal assaults on legislative apportionment is a plaintiff's claim that his right to vote has been abridged in an unconstitutional fashion,[17] it follows that where there is nothing in a given scheme that is repugnant to the Constitution, a federal court ought not to substitute a plan which might seem to it only to be more efficient or more just than a plan preferred by the legislature concerned. Even when an existing state or local election scheme is unconstitutional, the Supreme Court has consistently ruled that the legislative body involved ought to be given a reasonable opportunity to devise a constitutional plan, and that if the

[17] Actions brought pursuant to the Voting Rights Act, 42 U.S.C. § 1973c, are constitutional in nature, for a court presented with such a case must decide whether the election plan involved has either the purpose or the effect of abridging the right to vote on account of race or color.

legislature does so, its "freedom of choice to devise [constitutional] substitutes . . . should not be restricted beyond the clear commands of the Equal Protection Clause." Burns v. Richardson, 1966, 384 U.S. 73, 85, 86 S.Ct. 1286, 1293, 16 L.Ed.2d 376, 387. In accordance with this rule of deference to state or local legislative policies which are not unconstitutional, the Court has reversed or vacated several federal court decisions where the trial court declined to accept a constitutional state or local plan or failed to accommodate a cognizable legislative policy insofar as possible, in cases where the court was itself forced to draw a reapportionment plan. *See* Gaffney v. Cummings, 1973, 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298; Mahan v. Howell, *supra;* Sixty-Seventh Minnesota State Senate v. Beens, 1972, 406 U.S. 187, 92 S.Ct. 1477, 32 L.Ed.2d 1; Whitcomb v. Chavis, *supra;* Burns v. Richardson, *supra.*

As this Court pointed out in Reese v. Dallas County, *supra,* one reason for judicial deference in dilution cases is a "respect for the institutional limitations on the courts' ability to gauge the ramifications of districting patterns. . . . [In dilution cases,] the courts must evaluate evidence of the political alignments of allegedly disadvantaged factions and infer the intent of the legislature from actions that may have several plausible motives." 505 F.2d at 887. Our discussion of the political situation in Ferriday is a good illustration of the often ambiguous circumstantial evidence which is frequently the only evidence available to plaintiffs in dilution suits. We have joined with plaintiffs, defendants and the district court in speculation about the probable effects of particular facets of the traditional electoral mechanism in Ferriday, and everyone concerned has necessarily engaged in predictions of the results of the Board's proposed mixed election plan. Although courts

must frequently attempt to define the undefinable and render judgments on the basis of uncertain or unknowable factors, the particular difficulty in dilution cases is that the factors to be weighed are often political in nature, and everything in our political learning teaches us that legislatures are better equipped than courts to balance all of the competing interests involved in legislative apportionment, unless the legislature's balancing is so fundamentally unfair as to be unconstitutional.[18] *See* White v. Weiser, 1973, 412 U.S. 783, 795-96, 93 S.Ct. 2348, 2354-2355, 37 L.Ed.2d 335, 346; Lytle v. Commissioners of Election, 4 Cir. 1974, 509 F.2d 1049, 1051-52; The Supreme Court, 1966 Term, 81 Harv.L.Rev. 69, 154-55 (1967); Comment, Political Gerrymandering: A Statutory Compactness Standard as an Antidote for Judicial Impotence, 41 U.Chi.L.Rev. 398, 409-11 (1974).

We might therefore conclude that the district court was in error when it failed to adopt the Board's constitutional mixed single-member-at-large-member electoral scheme. Plaintiffs contend, however, that even if the Board's mixed plan is constitutional, the district court was within the bounds of reasoned discretion when it ordered the implementation of the all-single-member plan as the more equitable alternative. They base this equitable remedy standard on our *Turner* decision and on the Supreme Court's recent decision in Chapman v. Meier, 1975, —— U.S. ——, 95 S.Ct. 751, 42 L.Ed.2d 766. Plaintiffs argue that *Turner* and *Chapman* draw a distinction between apportionment plans already in operation and proposed schemes advanced by legislatures for adoption only in the

[18] It is for this reason that evidence of discriminatory legislative intent is so valuable in dilution cases, for where illegal discrimination is the legislative interest underlying the election scheme, such an "interest" deserves no judicial deference.

event that the existing districting system is found to be unconstitutional. Even if the first variety of plan deserves judicial deference, plaintiffs contend that there is no reason for courts to defer to the legislative judgment for fear of dislocating the electoral mechanism where a new plan must be implemented in any event.

A major defect in plaintiffs' argument is that courts do not defer to legislative judgments regarding reapportionment out of a concern that judicial intervention will cost time, money or personal inconvenience to the affected parties. We have just shown that courts usually defer to legislative preferences because of the complex political judgments involved in reapportionment plans. In short, it does not matter whether the legislature's plan is operational or merely prospective. Nor does *Turner* offer any solace to plaintiffs. Although it is true that we affirmed the district court's choice of the black plaintiffs' reapportionment plan in that case, the fact is that the defendant police jury in *Turner* elected to stand on the existing all-at-large election scheme, so that when the trial court found that system to be unconstitutional, it had the choice of adopting the plaintiffs' admittedly constitutional plan or creating one of its own. There was no question of choosing one of two acceptable plans; the district court instead picked the *only* acceptable plan. Finally, *Chapman* was a case where a federal district court drew its own reapportionment plan for the North Dakota state legislature and utilized multi-member districts for the state senate. The unusual thing about this procedure was the fact that the North Dakota legislature had never used such districts in its own plans. In these circumstances, the Supreme Court applied the rule of Connor v. Johnson, *supra,* and held that since multi-member districts were disfavored electoral tools, federal courts generally ought not to include them in plans of their own creation. The Court's determination was based not on any constitutional considerations but on its supervisory powers over federal courts. —— U.S. at ——, 95 S.Ct. at 761, 42 L.Ed.2d at 779. There was no departure in *Chapman* from the rule of judicial deference with respect to reapportionment plans. On the contrary, the Court specifically stated that "the standards for evaluating the use of multi-member districts . . . clearly differs depending on whether a federal court or a state legislature has initiated the use." —— U.S. at ——, 95 S.Ct. at 762, 42 L.Ed.2d at 779-80, and warned that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." —— U.S. at ——, 95 S.Ct. at 766, 42 L.Ed.2d at 784-85.

There is no legal basis for plaintiffs' arguments in support of the district court's choice of redistricting plans. We conclude that the trial court should have adopted the mixed plan in deference to the Board of Aldermen's considered preference for a plan incorporating one at-large place into the aldermanic election scheme.

VI

The district court awarded attorneys' fees to plaintiffs on the basis of the "common benefit" and "private attorney general" rationales. The court reasoned that such an award was proper in that plaintiffs' action has rid Ferriday of a blatantly unconstitutional aldermanic election system, thereby rendering a signal service to Ferriday's black citizens—the full effectuation of their voting rights—and aiding the congressional intention embodied in 42 U.S.C. § 1983. 377 F.Supp. 1192, 1202-08. We believe that the

common benefit or "common fund" rationale of Mills v. Electric Auto-Lite Co., 1970, 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593, and Sprague v. Ticonic National Bank, 1939, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184, is inapposite here because there was no fund created by the litigation, and no indication that an award of attorneys' fees against the Board of Aldermen will spread the costs of the lawsuit proportionately among the class that will benefit from this litigation. See Hall v. Cole, 1973, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702.

At the time of the district court's decision, its award of attorneys' fees on the private attorney general rationale was certainly justified by the general application of that rule by the lower federal courts. *See, e.g.,* Fairley v. Patterson, 5 Cir. 1974, 493 F.2d 598; Lee v. Southern Home Sites Corp., 5 Cir. 1971, 444 F.2d 143; Yelverton v. Driggers, M.D. Ala. 1974, 370 F.Supp. 612, Sims v. Amos, M.D. Ala. 1972, 340 F.Supp. 691, aff'd, 409 U.S. 942, 93 S.Ct. 290, 34 L.Ed. 215. In the very recent case of Alyeska Pipeline Service Co. v. Wilderness Society, 1975, —— U.S. ——, 95 S.Ct. 1612, 44 L.Ed.2d 141, however, the Supreme Court has unequivocally declared that the private attorney general rule cannot support the award of attorneys' fees in federal cases, in the absence of a specific statutory mandate. After a thorough review of the general "American rule" against the award of attorneys' fees, the *Alyeska Pipeline* Court decided that the current trend towards invocation of the private attorney general exception was about to eradicate the general rule in many types of lawsuits. The Court expressed no opinion on the merits of the general rule, but rather based its decision on the consideration that Congress—and not the courts—has the responsibility

to make specific exceptions to the rule against award of attorneys' fees:

> It appears to us that the [private attorney general rule] would make major inroads on a policy matter that Congress has reserved for itself. Since the approach taken by Congress . . . has been to carve out specific exceptions to [the] general rule . . ., [federal courts] are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases . . .

—— U.S. at ——, 95 S.Ct. at 1627, 44 L.Ed.2d at 159-60.

The *Alyeska Pipeline* Court explicitly placed awards of attorneys' fees in section 1983 actions within the prohibition of its decision and specifically disapproved our *Fairley* and *Lee* cases which had espoused the theory upon which the district court relied. We thus have no doubt that *Alyeska Pipeline* precludes any award of attorneys' fees to plaintiffs on the theory that they have acted as private attorneys general.

However, the district court also found that "the Board of Aldermen's steadfast adherence to a constitutionally unacceptable plan during the course of this litigation would amount to bad faith," 377 F.Supp. at 1206, and that finding is supported by the record, although the able trial judge preferred to base his award on what at the time seemed to be the equally solid ground of the private attorney general rule. The Supreme Court recognized in *Alyeska Pipe-*

pine that the "bad faith" rationale was an assertion of "inherent [equitable] power in the courts to allow attorneys' fees in particular situations," —— U.S. at ——, 95 S.Ct. at 1622, 44 L.Ed.2d at 154, and found no defect in that exception to the general rule. *See also F. D. Rich Co., Inc. v. United States for Use of Industrial Lumber Co., Inc.*, 1974, 417 U.S. 116, 129, 94 S.Ct. 2157, 2165, 40 L.Ed.2d 703, 713-14. Since I believe that the district court's award of attorneys' fees to plaintiffs is justified by its finding of defendants' bad faith in the defense of an obviously unconstitutional election scheme, I would affirm the trial court's order in that regard. My brothers Roney and Grooms, however, have concluded that the order awarding attorneys' fees should be vacated, for the reasons given in Judge Roney's concurring opinion.

VII

We hold today that pursuant to the rule of rational empiricism announced by *Chavis* and *Regester*, Ferriday's traditional all-at-large aldermanic election system has operated to dilute the voting rights of the Town's black citizens by depriving them of meaningful representation on the Board of Aldermen and thus denying them any hope of consideration in the affairs of the community in which they live. On the other hand, close scrutiny of the record convinces us that the fact that the all-at-large plan is unconstitutional does not mean that no at-large places at all can be tolerated in the circumstances of this case. We find that the Board's mixed plan will have no unconstitutional impact upon the voting rights of anyone in Ferriday. Due deference to the long-established Louisiana policy favoring at least some at-large positions in aldermanic elections leads us to conclude that the Board's preference for the

mixed plan must override the district court's preference for the all-single-member plan.

We do not write today concerning every election plan in every city and town in this Circuit for all time to come; we deal only with a particular proposed aldermanic election scheme in Ferriday, Louisiana. We sympathize with the position of the able trial judge who, when faced with overwhelming evidence of longstanding political injustice, perhaps leaned over backwards to ensure that the wrongs of many generations were righted by his order in this case. The Constitution, however, demands not racial representation by ratio but racial equity in the political process, and although the traditional aldermanic election plan in Ferriday has illegally abridged the voting rights of local blacks, there is nothing here to show that the Board's new and very different plan will yield similarly unconstitutional results. *See* Dallas County v. Reese, 1975, —— U.S. ——, 95 S.Ct. 1706, 43 L.Ed.2d ——; Dusch v. Davis, 1967, 387 U.S. 112, 117, 87 S.Ct. 1554, 1556, 18 L.Ed.2d 656, 660. We are not prepared to presume, as plaintiffs do, that no white person in Ferriday can fairly represent a black person. If our faith in the future be mistaken, if the one at-large aldermanic position should perpetuate while officeholder underrepresentation of black interests, the courthouse door will not be locked against anyone who may be effectively disenfranchised by the electoral scheme we approve today.

Affirmed in part; reversed in part; vacated in part and remanded.

GROOMS, District Judge.

I concur in Judge Goldberg's opinion, except as to his position on the award of attorney's fees. I concur in and adopt Judge Roney's opinion on that issue.

RONEY, Circuit Judge (specially concurring).

The appellants conceded before this Court that the all-at-large election scheme was unconstitutional. It seems to me that we should start with that concession and that we are relieved of any judicial necessity to decide the correctness of the district court's decision in this regard. I would not voice an opinion one way or the other, then, as to the validity of the all-at-large election scheme in this town of 5,200 people.

With that concession, the only issue for us to decide is whether the appellant town's mixed single-member-at-large-member electoral system is constitutional such to make erroneous the district court's ordered implementation of appellee's all-single-member plan. I fully concur in the decision that the Board of Aldermen's plan is constitutional and in Judge Goldberg's thorough and well-reasoned opinion dealing with this issue.

With respect to the district court's award of attorney's fees, I would vacate and remand for reconsideration by the district court in light of two factors: the demise of the private attorney general rationale in Alyeska Pipeline Service Co. v. Wilderness Society, —— U.S. ——, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), and our decision here that the Board of Aldermen's plan submitted to the district court is constitutional.

First, it is impossible to tell to what extent the district court's reliance on the attorney general rationale may have permeated its finding that bad faith likewise supported the attorney's fee award. The issue of attorney's fees should be reconsidered by the district court on the issue of bad faith alone.

Second, the district court had decided that the plan proffered by the town was unconstitutional when it found that

"the Board of Aldermen's steadfast adherence to a constitutionally unacceptable plan during the course of this litigation would amount to bad faith." 377 F.Supp. at 1206. The issue of bad faith should be reconsidered in light of the fact that, having lost its defense of the all-at-large plan, the Board did submit a constitutionally acceptable plan to the district court. It is for the district court to decide whether, in light of this fact, there was "steadfast adherence to a constitutionally unacceptable plan."

The town briefed on appeal the issue as to the district court's finding that the all-at-large plan was unconstitutional, but then conceded the point on oral argument. All of these facts should be remanded to the district court to reconsider anew the issue of bad faith. I would not indicate one way or the other which way that issue should be resolved.

Order of the Court of Appeals, September 29, 1975

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

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CLERK

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NEW ORLEANS, LA. 70130

September 29, 1975

TO ALL COUNSEL OF RECORD

No. 74-2654—George Wallace, Sr. et al. vs J. P. House, etc., et al.; L.W. Davis, etc., et al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

by CLARE F. SACHS
Deputy Clerk

cc: Mr Norman Magee
Mr. Paul H. Kidd
Mr. Stanley A. Halpin
Mr. A. Mills McCawley